The London School of Economics and Political Science

The Role of "Pro-Black" Criminalization Policy in Enabling and Constraining the Mobilization of Egalitarian Racial Reform, US 1669-2008

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A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy, London, December 2009

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Abstract

In the early 1980s, the American legal system introduced a novel legislative model for tackling the age-old problem of racist violence. Within less than three decades, this novel legislative model was adopted by 47 states across the US, and was 'imported' by dozens legal systems around the globe. Legislatures and advocacy organizations portray the introduction of hate crime laws as an effective instrument for minimizing the disproportionate vulnerability of racial minorities to criminal victimization. Scholars have praised their virtues in symbolizing the commitment of the state to providing racial minorities with equal concern and respect. Yet there is something curious, even paradoxical, about the deployment of criminalization – a coercive form of governance so often associated with the perpetuation of structural disadvantage – with such emancipatory ends. This study considers how the embedding of hate crime policies within institutional and political structures which reflect broader patterns of racial and class inequality affect their suitability to achieve their declared emancipatory aims.

In pursuing this goal, I place hate crime policies within broader historical and theoretical perspectives. Historically, I consider the way in which the idea of "pro-black" criminalization has been framed and institutionalized from the slavery era to the present. Theoretically, I explore a range of sociological and socio-legal questions regarding the distinctive institutional and ideological functions played by "pro-minority" criminalization regimes. I define "pro-black" (or "pro-minority") criminalization as comprising of legislative and enforcement arrangements that are specifically aimed at protecting African-Americans (or other minority groups). My analysis shows that, throughout most of American history, "pro-black" criminalization regimes (including hate crime policies) were embedded within broader policy structures which worked to stabilize fundamental aspects of the prevailing system of racial stratification. This pattern was rooted in institutional and ideological features that are likely to characterize "pro-minority" criminalization reforms in various other contexts of social inequality. Overall, I argue, while "pro-minority" criminalization reforms serve to alleviate particular forms of violence and degradation which minorities are disproportionately subjected to, they also work to stabilize the broader systems of social inequality within which these symptoms are embedded.

Acknowledgements

It is a special pleasure to express my deep gratitude to my supervisors, Nicola Lacey and Robert Reiner, for their inspiration, mentorship, encouragement, and extremely generous support. My work with them has been a wonderful intellectual journey and I am sure that their formative influence on my thinking will continue to inspire my scholarship for many years to come.

Over the four years in which I have been working on this project, I benefited greatly from feedback and discussion of my work with many friends, colleagues and teachers at the LSE. While I cannot name them all, I am particularly grateful to Manolis Mellissaris and Peter Ramsay for their comments and encouragement. I was fortunate to spend the final months of my work on this thesis at the Centre for the Study of Law and Society at UC Berkeley. I would like to express my deep appreciation to Jonathan Simon and Malcolm Feeley, who read parts of the dissertation and offered invaluable suggestions. My deepest debt, which continues to grow daily, is to Karin. I dedicate this thesis to her, with much love and gratitude, and to Daniel, for enriching our lives in such a delightful way.

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Chapter 1: Introduction

The struggle of man against power is the struggle of memory against forgetting
Milan Kundera

A. Introduction

The problem of bias-motivated victimization of African-Americans has been one of the most devastating aspects of American racial history. Throughout the slavery era, blacks were routinely subjected to whipping, as well as to multiple other forms of physical and psychological abuse.[1] Less than two decades after Emancipation, spectacles of public torture lynching became widespread across the American South.[2] Conducted in front of crowds of hundreds and sometimes thousands, "lynch victims were hung from trees, from utility poles, (and) from bridges".[3] The mass migration of African-Americans to the North during the first half of the twentieth century was met with a surge of Klan terror, which served to drive them away from white neighbourhoods.[4] With the intensification of black civil rights protest in the 1950s, black churches became targets of firebombing and terror.[5] These horrific reminiscences of the black experience continue to rankle in the collective consciousness of African-Americans.[6] They also provide white America with an appalling reminder of the measure of brutality which can thrive even within a constitutional order that defines its ideals in terms of respect to liberty and equality under the rule of law.

In the early 1980s, the American legal system adopted a new legislative model for solidifying the protection of African-American victims. At the core of this new model lies the idea of enhancing the offender's penalty if he intentionally selected his victim because of her actual or perceived racial identity.[7] This new model has been institutionalized through the enactment of hate crime laws. The term hate crime was first introduced into criminal codes in 1981, when the states of Oregon and Washington were the first to enact this new model of penalty enhancement legislation. To date, 47 states and the District of Columbia have adopted at least one piece of hate crime

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[1] Stampp (1956: 171-191: describing the routine use of such methods as chaining and ironing, whipping, branding, mutilation, and mauling with dogs).
[2] Garland (2005: 803).
[3] Ibid, 805.
[4] Klarman (2007: 115).
[5] Branch (1988: 793-802).
[6] Kennedy (1998: 48).
[7] Jenness (2001: 295-301).

legislation.[8] Congress developed a distinct legal framework of penalty enhancement for bias-motivated perpetration of federal offences.[9] The issue of hate crime became a salient topic on the national political agenda. Senior politicians have used the most prominent forums of American politics for manifesting their support of furthering hate crime legislation (including, the State of the Union Address[10] and election debates between presidential candidates).[11] In the official website of President Barack Obama, the pledge to "strengthen federal hate crime legislation" is placed at the top of the administration's agenda for "criminal justice reform".[12]

While hate crime legislation seeks to protect other categories of victims in addition to African-Americans, it gained a special significance as a symbol of America's progress towards curing the racial wounds left by the systems of slavery and Jim Crow.[13] Hate crime laws are perceived as effective instruments for minimizing the disproportionate vulnerability of African-Americans to criminal victimization. They are also praised for symbolizing the commitment of contemporary American society to denouncing racism and to eradicating symptoms of bigotry.[14] Yet there is something curious, even paradoxical, about the deployment of criminal law – a system so often associated with the perpetuation of structural disadvantage – with such emancipatory ends; and this raises some important question about the validity of this conventional account. The first goal of this study is to examine a couple of historical questions which are central to any serious attempt to assess the validity of this accepted lore. First, in what respects do hate crime policies depart from the legal regimes through which the problem of black victimization was tackled in earlier stages of American history? Second, to what extent are hate crime policies susceptible to institutional and political pitfalls similar to those which inhibited the protection of African-Americans in the past?

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[8] Shively (2005: 9).

[9] Hate Crime Sentencing Enhancement Act (Pub. L. § 103-322). In October 2009, Congress passed the Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act, which was signed into law by President Barack Obama as a division of the National Defense Authorization Act for 2010 (H.R. 2647).

[10] See examples in Broad and Jenness (1997: 3).

[11] "Bush Stance on Bias Crimes Emerges as Campaign Issue", **NY Times** Oct. 13 (2000). http://query.nytimes.com/gst/fullpage.html?res=9F06E7D8153FF930A25753C1A9669C8B63.

[12] http://www.whitehouse.gov/issues/CIVIL_RIGHTS/.

[13] The unique salience of racist violence as an epitome of "hate crime" is reflected in the inclusion of this form of bias-motivated victimization within the hate crime statutes of all 47 states in which such legislation is in force (as well as in federal penalty enhancement laws). By comparison, sexual orientation is currently included in the hate crime statues of 31 states, and gender in 27 states. See: Anti Defamation League State Hate Crime Statutory Provisions (http://www.adl.org/99hatecrime/intro.asp). Moreover, a time-sensitive analysis of the evolution of the hate crime canon reveals that, by 1988, racially-motivated violence was already included in all hate crime statutes throughout the nation. By then, both gender and sexual orientation were recognized by only one fifth of the states (Jenness (2001: 301-306)).

[14] On the expressive dimension as a central virtue of hate crime legislation, see: Lawrence (1999: 163-169).

From a broader perspective, the recent proliferation of hate crime laws raises important and timely questions regarding the potential contribution of criminalization reforms to the pursuit of social equality. This proliferation was part and parcel of a wider trend in contemporary law and politics. Over the last decades, progressive social movements and policymakers have turned with new vigour to mobilizing criminalization reforms as a means of facilitating egalitarian social change. This has resulted in the introduction of various new categories of "pro-minority" criminalization, i.e. criminalization policies that are specifically aimed at tackling the victimization of women and minorities (in addition to hate crime, key examples would include stalking, sexual harassment, and various amendment to rape and domestic violence laws). As our historical discussion will show, the idea of "pro-minority" criminalization is not novel. But its current salience on the broader agenda of progressive activists should urge us to develop a better understanding of how such criminalization regimes operate and of their characteristic virtues, limits, and boomerang effects as a vehicle of progressive reform.[15]

A1. The Contribution of the Study to the Literature on Law, Race and Violence in American History

In order to address these questions, I will explore the evolution of legal responses to bias-motivated victimization of African-Americans from the slavery era to the present. By placing hate crime policies within this context, I take a distinctive approach vis-à-vis the existing literature on hate crime. As will be discussed in detail in section B of this chapter, scholars have offered various interpretations of the social and political forces which led to the emergence of hate crime legislation since the 1980s. The success of hate crime policies in meeting their stated goals has also been the subject of a lively debate. However, the underlying methodological assumption which informed the various positions in these debates was that it is possible to understand the underpinnings and consequences of hate crime policies by focusing on post-1970 social and political developments.[16]

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[15] Throughout the dissertation, I employ the concept of *criminalization* as an analytic framework for exploring the entire range of social and institutional practices through which societies define, identify and respond to "crime". To emphasize, the practices which constitute formal legal definitions of crime (most notably, legislative and judicial acts of lawmaking) are central to this inquiry. However, my investigation takes on board a much broader and de-centralized terrain of discourses and practices. This terrain encompasses the interactions between both institutional actors (including policing and prosecutorial agencies) and non-institutional actors (most notably, social movements) while negotiating the definitions and enforcing the legal rules through which societies label and respond to "racist violence". For a theoretical elaboration of the explanatory power of this approach to studying processes of criminalization, see: Lacey (1995); (2007); (2009).

[16] For example, James Jacobs and Kimberly Potter open their influential study on hate crime with the following statement: "to understand why American society passed hate crime laws in the 1980s requires

In this study, I challenge this conventional mode of framing the inquiry. I argue that in order to comprehend the origins, functioning and effects of hate crime policies, we have to place them within a much broader (and more complex) chronological perspective. This perspective encompasses the shifting forms of activism, lawmaking and enforcement practices through which the problem of black victimization has been tackled throughout the entire evolution of American race relations. When placed within this context, it becomes clear that the idea of introducing a new criminal category for combating the victimization of African-Americans is far from being a post-1970 innovation. Interestingly enough, legislation which (at least in some important respects) appeared to protect slaves' human dignity and physical integrity, was first introduced in the antebellum South, when legislatures and courts developed a distinct body of law for penalizing "slave abuse". In the early 1870s, when Klan terror began to surge in ex-Confederacy states, Congress enacted new legislation which authorized the federal administration to prosecute white supremacist interferences with freedmen's civil rights.[17] While the scale of white supremacist terror had soared during the late nineteenth century, this deterioration cannot be ascribed to the dearth of applicable criminal laws. After all, the entitlement of African-Americans to equal protection had been solemnly enshrined in the Constitution only two decades earlier.[18] Following the founding of the NAACP in 1909, campaigns for the enactment of a federal anti-lynching bill gained considerable support among national politicians. Although this campaign failed to yield the passing of a federal anti-lynching bill, it elevated public concerns and awareness of the problem of black victimization. In 1968, Congress passed new legislation which made it a federal crime to interfere with African-Americans' participation in a range of "federally protected activities" because of racial bias (these activities include voting, jury service, enrolling in public schools or colleges).[19]

The failure of the existing literature to consider whether there are significant continuities (and thus to specify the differences) between hate crime laws and the legal reforms introduced in different periods for tackling the victimization of African-Americans might reflect the assumption that these reforms belong to under-developed phases in the evolution of American race relations.

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examining the history of the post-World War II period, especially the civil rights movement and the subsequent triumph of identity politics". Jacobs and Potter (1998: 5). Accordingly, they devote only 3 pages of their book to discussing earlier legislative models for tackling biased-motivation victimization of African-Americans. A similar approach is taken by Broad and Jenness (1997) and by Maroney (1998).

[17] 18 USC § 241, 242.

[18] Garland (2005: 809); Kennedy (1998: 36-47).

[19] 18 USC § 245.

This observation resonates with a conventional Whiggish view which "posit[s] an historical rupture that separates, roughly speaking, pre-1954 from post-1965 race relations".[20] According to this view, the landmark legislative and judicial reforms spurred by the Civil Rights Movement have revolutionized American politics and society in ways which dismantled the ideological and institutional mechanisms that precluded the adequate protection of black victims hitherto.

In contrast to this view, the approach underpinning my study stresses that the trajectory of American racial relations was shaped by a continuous dialectics between patterns of continuity and patterns of change, rather than by historical ruptures between incommensurable configurations of race relations. This approach draws on a growing body of literature on the racialized character of American political development.[21] Scholars within this paradigm have demonstrated how institutional and ideological patterns which crystallized during slavery, Jim Crow or the early ghettoization of the Northern black population continue to influence the forms, functions and outcomes of race-related policies in the present. One of the main challenges of this approach is to steer clear from reifying the deterministic power of the legacies of slavery and Jim Crow to preclude a meaningful amelioration of the conditions of African-Americans in the present. As phrased by Robert Lieberman, "just as we cannot assume that the past is dead, we should not presume that its ghosts always haunt present-day politics in the same way".[22] Nevertheless, I will attempt to show that, when applied in a way which is heedful of avoiding this methodological pitfall, the 'racialized political development' framework provides a more illuminating interpretive framework vis-à-vis the frames of analysis which inform the existing literature on hate crime laws.

In this context, the study explores the transformation of the forms of activism, legislation and enforcement which have shaped legal responses to the problem of black victimization in four successive eras in American racial history. In the **second chapter** (1669[23]-1865), I examine the evolution of legal responses to the victimization of blacks in the colonial and antebellum periods. Throughout these periods, the institution of slavery shaped the economic, political and social conditions of the overwhelming majority of African-Americans. In the **third chapter** (1865-1909),

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[20] Lieberman (2008: 213).
[21] King and Smith (2008); Lowndes (et al, 2008); Lieberman (2008).
[22] Lieberman (2008: 225).
[23] Although the first African slaves were brought to the New World already in the early seventeenth century, the first legal source which defined the scope of criminal responsibility for violence inflicted upon slaves was recorded in Virginia in 1669. Morris (1996: 164).

I look at how the rise and fall of the Reconstruction project shaped political and legal responses to the problem of white supremacist violence (at both the regional and national political arenas). In the **fourth chapter** (1909-1968), I explore the way in which the rise of the Civil Rights Movement, and the broader transformations which American society experienced throughout this transitional period (including, the incorporation of blacks into the national economy and electorate; the entrenchment of the New Deal model of government; and the impact of Cold War dictates on domestic civil rights policy) had transformed the character of public debate and policymaking in this field and led to the revival of federal civil rights criminalization policy. In the **fifth chapter** (1968-2008), I probe how the transformation of American politics and society in the wake of the landmark civil rights reforms of the 1960s gave rise to new forms of activism and lawmaking around the problem of black victimization, and consider how the social and institutional changes which took place during this period had affected the implementation of hate crime policies.

With regard to each of these four periods, I pose two major questions: first, what were the driving forces which shaped the distinct character of legislative and enforcement responses to the prevailing patterns of black victimization? Second, what were the consequences which followed from the introduction of (or from the failure to introduce) new legal regimes for tackling the victimization of African-Americans?

Methodological Issues

Because this work is intended as a contribution to interdisciplinary legal scholarship rather than to the non-legal disciplines on which I draw, my treatment of these questions might in some respects differ from how a specialist working squarely within these disciplinary fields would have examined them. It is important to clarify some of the major differences, and to acknowledge the limits of my argument, in particular with respect to its possible contribution to the historical literature.

The study does not aim to explore new archival data about the origins and functioning of "pro-black" criminalization. Rather, its account of each period seeks to synthesize the evidence established by the existing literature in order to construct a new interpretation of the role played by "pro-black" criminalization regimes in enabling and constraining the mobilization of egalitarian racial reform. The decision to focus on secondary literature was based on the realization that, given the vast scope of the topic (covering more than 350 years of legal, political, and social developments), it would not be possible to conduct comprehensive and rigorous archival research

on each of the periods. Given the burgeoning interest in this field in social theory, social history and political science over the last twenty years, the secondary literature is itself both extensive and rich. The selection of the secondary literature materials was based on thorough literature reviews and the exercise of academic judgment about the most authoritative and persuasive scholarly works on each period (taking into account criteria such as the frequency of citations and the academic reputation of journals and publisher of each source). The decision to focus on the secondary literature was by no means intended to contest the crucial importance of archival research in historical scholarship. The purpose was to construct a workable frame of analysis which would enable us to examine the explanatory potential of the evidence on how and why new regimes for protecting black victims were debated, enacted, and enforced in the past, with the ultimate aim of gaining a better understanding of current explanatory and political challenges in the field of "pro-black" criminalization. I acknowledge that, if the purpose of this study would have been to make a contribution to the historical literature per se, a more extensive independent use of primary sources would have been needed (rather than, as attempted in this thesis, a focus on selecting the secondary sources that are recognized as most authoritative in summarizing the archival evidence). It is my hope that the analysis in this dissertation could serve as a basis for follow-up investigations which would utilize archival works in order to deepen and enrich the analysis developed in my study.

Inevitably, given the immense volume of literature on American racial history, the task of organizing the evidence into a meaningful and coherent narrative entails moments of selection. My interpretation focuses on how "pro-minority" criminalization has served to facilitate the delivery of both political legitimation and practical coordination of aspects of social organization. To clarify, the focus on this theme as a major thread of the interpretation is not aimed at dismissing the plausibility of alternative narratives. For example, other readers might have preferred to give stronger representation to personal narratives of the lived experiences of victims or to look more closely at the evolution of regulatory regimes from one era to another. These are highly important issues,[24] and I believe that my own interpretation provides a basis for further consideration of them in the future.

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[24] As John Braithwaite (2003) has argued, there are important explanatory and analytic insights that can be gained by locating the development of modern crime-control and penal institutions within the broader genealogy of the evolution of rationalities, techniques and strategies of regulation in modern societies. At the same time, as Braithwaite acknowledges (Ibid, 24), genealogies of regulation would inevitably face their own explanatory limits, and might benefit from conducting a dialogue with alternative interpretive frameworks (including, I would suggest, the one developed in this study).

In the context of the contribution to legal scholarship, my primary motivation is to move beyond the explanatory limitations of studies of criminalization which do not attach due attention to questions of historical context. Given the enduring dominance of analytic and doctrinal thinking in criminal law scholarship,[25] it is important to construct such a historically-contextual framework for understanding the forms and functions which "pro-black" criminalization has taken and served in different periods in order to gain a better grasp of its potential and limits today. In particular, I believe that the value of my contribution to interdisciplinary legal scholarship should be examined with respect to two main criteria. First, whether the study sheds light on the patterns of similarity and dissimilarity with regard to the way in which the problem of black victimization was tackled by the American legal system in different historical periods. Secondly, whether this contextualization can enrich our understanding of normative and explanatory questions (with which the current hate crime literature engages) that cannot be fully understood when examined within the conventional frame of focusing on post-1970s developments in American society. Admittedly, a better understanding of the past does not always provide a privileged prism for coming to terms with these explanatory and normative challenges. For example, by identifying the origins of earlier regimes of "pro-black" criminalization, I do not mean to assert the existence of a direct lineage between these regimes and hate crime laws.[26] However, as I will try to demonstrate, by taking a closer look at the past than has been taken by other students of hate crime laws, it is possible to construct a comparative prism which can improve our understanding of the social and political functions of "pro-black" criminalization.

A2. The Contribution of the Study to a Sociological Theory of "Pro-Minority" Criminalization

On the basis of this historical inquiry, this study seeks to probe some more general sociological and socio-legal questions regarding the nature of "pro-minority" criminalization policy. As noted above, the post-1980 proliferation of hate crime legislation coincided with the emergence of various other novel "pro-minority" criminal categories. The hate crime campaign itself served as a medium through which various minority groups had politicized their experiences of victimization, and used such campaigns for furthering broader struggles for political and legal

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[25] See: Norrie (2001: 7-8); Farmer (1996: chapter 1); Lacey (2009: 950-958).

[26] As recognized by David Garland, one reason which warrants steering clear of asserting such a lineage would be that, even if their emergence was a product of particular historical forces, such regimes – through being subjected "to change, reconstruction, partial success or downright failure" – might have come (over time) to facilitate unanticipated (and sometimes competing) political projects. Garland (1985: 4).

recognition.[27] For example, the Hate Crime Statistics Act (1990) was the first federal statute in which the commitment of the State toward gays and lesbians was officially recognized (even if in the very limited form of compiling evidence of their victimization).[28] The problem of victimization has also become an increasingly salient issue on the feminist reformist agenda.[29] Over the last decades, feminist scholars and activists have effectively spotlighted the way in which long-established forms of defining and enforcing sexual violence mirrored (and in turn reinforced) patriarchal norms and social institutions which permeate the political and social fabrics of Western countries.[30] Some feminist campaigns triggered substantial reforms of the way in which pervasive problems such as rape[31] and domestic violence[32] are being tackled by the criminal justice system. Others prod legislatures to outlaw additional forms of sexist conduct (e.g. stalking[33] and sexual harassment[34]).

By and large, this recent wave of "pro-minority" criminalization reforms has ameliorated many of the institutional shortcomings which hampered the protection of marginalized minorities in the past. As Bernard Harcourt has shown, some of these campaigns have generated a profound impact on legal and political thinking by unveiling the coerciveness embedded within social practices that were traditionally conceptualized as "harmless wrongdoing" in the liberal tradition.[35] However, as I have argued elsewhere, the fact that these campaigns gained ground within a political setting suffused with populist forms of "governing through crime" has inevitably constrained their ability to initiate policy reforms that address the root causes of these

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[27] It is important to note that my decision to focus on placing hate crime laws within the context of African-American history is in no way meant to minimize the significance of the disproportionate vulnerability of other minority groups (including gays and lesbians, women, Asian-Americans, and Latinos) to bias-motivated victimization. The focus on African-Americans stems from a recognition of the unique (and under-studied) role played by the victimization of this group in shaping American political and legal history. I believe that my historical study is not only compatible with similar inquiries into the evolution of legal and political discourses on the problem of minority victimization in other contexts of intergroup inequality. It actually serves as a basis for such inquiries, which I hope to pursue in the future.

[28] Crimes motivated by bias toward the victim's sexual orientation were included in federal sentencing enhancement schemes only in October 2009. As noted earlier, various states have included such provisions from the 1990s onwards.

[29] Brown (1995: chapter 3); Bumiller (2008); Simon (2007: 188-191); Smart (1989).

[30] MacKinnon (1991a).

[31] Smart (1989: chapter 2); MacKinnon (1991b); Temkin (2002).

[32] Mills (2003); Bumiller (2008).

[33] Kamir (2001: chapter 8).

[34] Schultz (1998).

[35] Harcourt (1999: 140-154).

forms of victimization.[36] I believe that the achievements, pitfalls and unintended consequences of each of these campaigns can only be fully illuminated by means of a close historical investigation of the specific political and institutional forces which have shaped their forms and outcomes. However, in order to prevent such studies from becoming unable to see the wood for the trees, the sociology of criminalization has to make a progress toward developing a general explanatory framework for understanding the conditions of existence and the modus operandi of "pro-minority" criminalization regimes. With this purpose in mind, although this research examines a series of case studies related to the protection of a particular minority group within a particular national context, I attempt to integrate the major historical observations of this inquiry with a broader theoretical analysis of the nature of "pro-minority" criminalization as a discrete terrain of activist, legislative, and enforcement practices.

In pursuing this aim, I will mainly focus on the following questions: How does the interplay between social structure and human action (agency) shape the way in which social movements frame the political meanings of the problem of minority victimization? What are the forces and incentives which impel policymakers to adopt new models of "pro-minority" criminal legislation in response to such campaigns? What are the institutional determinants which affect the enforceability of "pro-minority" legislation? How do the distinctive features of criminal law as a medium through which the State[37] constructs the meaning of social harm (e.g. its focus on individualizing blame; its implicit prioritization of punishment as a suitable form of redress) affect the way in which we tend to think about the sources of and solutions to patterns of minority victimization? What are the virtues of criminalization campaigns as strategic vehicles within broader struggles for political emancipation? What are the attendant costs which such strategic mobilization is likely to entail?

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[36] Aharonson (2010).

[37] Throughout the dissertation, I will use the term State as a socio-scientific concept, referring to the set of institutions that possess the authority to enact and to enforce criminal laws. It is important to emphasize that the forms of institutionalizing the power to criminalize have transformed markedly throughout American history. These transformations reflected broader shifts in the allocation of legislative prerogatives and enforcement responsibilities between different layers of the American governmental system (i.e. between state-level, local and federal governments). As I will show, political debates over the desirable and feasible role of criminal law in protecting African-Americans not merely mirrored pre-existing ideas about the required allocation of these prerogatives and responsibilities (and, implicitly, about the normative commitments and regulatory goals which the State ought to pursue). They also played a constitutive role in shaping these ideas.

B. Rethinking the Origins of "Pro-Minority" Criminalization through Engaging with the Hate Crime Literature

So far, I have indicated the intended contribution of this study to two broad fields of historical and sociological scholarship. In this section, I move to engage more directly with the literature on hate crime, which serves as a point of departure for developing these broader historical and sociological investigations.

The existing literature on the origins of hate crime legislation offers three alternative theses for explaining why this new legal framework emerged in the early 1980s. Each of these historical theses is premised on a distinct underlying theory of the conditions under which "pro-minority" criminalization reforms are likely to be materialized. In this section, I will critically discuss the flaws of each of these theses and of the underlying theories upon which they are based. This critique will be twofold. First, I will argue that the theses advanced in the existing literature have failed to explain the interrelations between the proliferation of hate crime legislation and concurrent trends which took place in American politics of crime during the 1980s. Second, I will argue that their underlying theories regarding the conditions which enable the emergence of "pro-minority" criminalization regimes are lacking in their explanatory power of earlier phases in the history of "pro-black" criminal lawmaking. On the basis of critique, I will sketch the distinctive thesis which this study develops for explaining the conditions of existence of "pro-black" criminalization (including the recent emergence of hate crime policy).

B1. Why Hate Crime Legislation Emerged in the 1980s? A Critique of the Existing Literature

I. *The "rising tide of bigotry-motivated violence" thesis*: the first conventional thesis suggests that the emergence of hate crime legislation in the early 1980s was responsive to rising recorded levels of bigotry-motivated violence. According to criminologists Jack Levin and Jack McDevit, for example, in the early 1980s, American society witnessed a "rising tide" of bigotry-motivated violence against various marginalized minorities.[38] In response, policymakers had to devise new legal tools which would be better equipped to addressing the

[38] Levin and Mcdevitt (1993).

unique nature of this type of criminality. In particular, it is argued, this rampage of hateful violence demonstrated the urgency of adopting harsher and more determinate sentencing schemes in order to increase the deterrent effect and to send a clearer message of moral censure.

This thesis should be criticized for espousing a naïve understanding of the triangular relationship between the social events which are labelled as "crime", crime statistics, and anti-crime policymaking. It is true that, in the mid 1980s, a rise in the recorded rates of bias-related crimes had been documented both by police departments and by NGOs.[39] However, as the literature on the methodological and political aspects of the production of crime statistics illuminates, the statistical representation of crime trends relies upon a myriad of contingent factors, e.g. the way in which the offence is defined, the extent to which police departments allocate resources and formalize the procedures of investigation and documentation of such conduct, and the willingness of victims and witnesses to report their experiences to the police.[40] In the case of hate crime statistics, it is clear that all of these variables were transformed drastically in the period in which this "rising tide" is believed to have taken place. The concept of "hate crime" is a neologism which gained currency in legal and popular discourses only in the 1980s.[41] From the 1980s onwards, dozens of specialist watchdog organizations were established.[42] These organizations have devoted an unprecedented amount of resources to monitoring and reporting data on the rates of hate crime. As James Jacobs and Kimberly Potter have demonstrated, much of this data is based on vague and all-embracing definitions or on flawed methods of measurement.[43] Even after the introduction of the Hate Crime Statistics Act in 1990, striking cross-state variations in legal definition of hate crime persist,[44] as well as significant variations in its modes of policing.[45] Hence, despite the popularity of the "rising tide of bigotry" thesis in media discourses of hate crime, it appears to be highly speculative.

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[39] Jacobs and Potter (1998: 57).
[40] Maguire (2007); Reiner (2007a: chapter 3).
[41] Jacobs and Potter (1998: 3).
[42] Jenness (2001: 285).
[43] Jacobs and Potter (1998: 47-49).
[44] Jenness (2001: 301-306); Perry (2001: 8).
[45] Hall (2004: 150-167).

The "rising tide of bigotry" thesis also reflects a crude understanding of the relationship between crime and criminal justice policymaking. The conditions which impel and enable policymakers to introduce new penal "solutions" to social problems are shaped by various determinants which are endogenous to the political process. These determinants include the electoral interests invested in supporting or opposing such legislation;[46] patterns of media coverage;[47] and the amount of resources available to interest groups mobilizing for and against such reforms.[48] Accordingly, an analysis of the conditions which facilitated the proliferation of hate crime legislation in the 1980s must take on board the way in which the unprecedented political fecundity of "governing through crime" during this period created new electoral opportunities and incentives to adopt a new form of anti-racist criminalization.[49] As I will argue in chapter 5, this examination reveals that the hate crime campaign had borrowed its major themes and "solutions" from populist trends which gained currency in post-1980 American politics of crime. This observation entails both explanatory and critical implications which are completely obfuscated by the "rising tide" thesis. Most importantly, this observation urges to move beyond the manifested appearance of hate crime policy as an instrumental response to a clearly-defined social problem and to look more closely at how the nexuses between hate crime policies and some of the more problematic components of contemporary law and order politics have shaped both the character and the implementation of these policies.

In addition, the core assumption of the 'rising tide' thesis – namely, the existence of a causal relationship between levels of crime and legislative reforms - cannot be usefully applied for explaining the development of "pro-black" criminalization policy in earlier epochs of American racial history. For example, the upsurge of lynching in the late nineteenth century did not generate any reform of legislative or enforcement policies. This dreadful episode in American racial history (which will be analyzed in chapter 3) clearly demonstrates that the ebbs and flows of "pro-black" criminalization policymaking do not directly correlate with the fluctuations of recorded rates of racist victimization.

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[46] Lacey (2008: 69-75); Simon (2007: chapter 3).
[47] Beckett and Sasson (2004: chapter 5).
[48] Gottschalk (2006: 37-40).
[49] Aharonson (2010).

II. *The "enlightenment of racial attitudes" thesis*: The second conventional interpretation of the emergence of hate crime laws maintains that, independently of whether the scope of bigotry-motivated violence had actually increased during the 1980s, American society experienced dramatic changes in racial attitudes and thus came to perceive traditional forms of racist conduct in a new (and more critical) light.[50] Following the "civil rights revolution", it is argued, various symptoms of America's racist culture (and, more recently, of its sexist and homophobic creeds) had been called into question. Because criminal law serves as a medium through which societies express and enforce compliance with their fundamental moral values, these cultural shifts have been reflected in legislative reforms which convey the community's sense of disapproval of such conducts. In turn, hate crime legislation not only mirrors but also constructs popular solidarities with minority victims.

While this interpretation possesses an element of truth, it ultimately fails to provide a satisfactory account both of the timing of the proliferation of hate crime legislation and of the overall trajectory of "pro-black" criminalization policy throughout American history. First, the 'enlightenment of racial attitudes' thesis is not supported by any other significant indicator of the way in which the American criminal justice system had been transformed following the "civil rights revolution". Contrary to what might have been expected in the wake of the remarkable legislative and judicial achievements of the 1960s, the proportion of African-Americans in prisons has increased dramatically throughout the last four decades (from a black/white ratio of 3:1 in 1968 to 7.6:1 in 2002).[51] This dramatic exacerbation was produced by the accumulative effect of a range of criminalization policies which selectively over-target black offenders,[52] and of sentencing policies which disproportionately affect black defendants.[53] As Michael Tonry has argued, the disparate impacts of many of these policies (most notably, War on Drugs and determinate sentencing reform) on African-Americans were foreseeable.[54] The fact that they were not repealed despite overwhelming evidence of their polarizing racial effects seems to be inconsistent with the historical account advanced by the 'enlightenment of racial attitudes' thesis. Indeed, rather than extending the

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[50] Lawrence (1999: 20).
[51] Gottschalk (2006: 3).
[52] Sklansky (1995).
[53] Tonry (1995: 56-63).
[54] Ibid (104-116).

egalitarian principles elaborated by liberal Justices and progressive politicians during the "civil rights revolution" (as implied by this thesis), the general trajectory of the American politics[55] and jurisprudence[56] of crime has clearly moved in the very opposite direction.

Second, the underlying theory upon which this thesis rests – namely, that the enactment of "pro-black" criminal laws reflects the evaporation of racist animus - does not possess explanatory power with regard to earlier chapters in the history of American "pro-black" criminalization. For example, this theory cannot explain how criminal statutes that were specifically aimed at protecting slaves could emerge in antebellum Southern society. As will be shown in chapter 2, these offences were enacted in an era in which Southern law categorically denied the entitlement of African-Americans to civil rights, and in which their full belonging to the human race was widely contested. This curious episode in the history of American "pro-black" criminalization suggests that, although such reforms are usually portrayed as being inspired by noble moral causes, the political and institutional forces which underpin their existence might be associated with social interests and political dynamics which are consistent with the preservation of the racial status quo.

III. *The "social movements/social problems" thesis*: The third thesis developed by the literature on the origins of hate crime legislation focuses on the role of social movements in politicizing the issue of bigotry-motivated violence and in shaping the agenda of policy reform. As Valerie Jenness has showed in a series of influential studies, since the late 1970s, dozens of watchdog organizations specializing in monitoring police practices toward minority victims were founded across the US.[57] Over the next decades, these movements institutionalized new strategies for attracting constant media attention to the problem of minority victimization, and engaged in intensive lobbying for the enactment of penalty enhancement hate crime legislation.[58]

By emphasizing the constructionist underpinnings of present-day understandings of "hate crime", this approach moves beyond the major shortcomings of the two theses discussed so far. The *social movements/social problems* thesis is capable of explaining the climbing figures of recorded interracial violence during the 1980s as attendant upon the

[55] Murakawa (2008).
[56] Bilionis (2005).
[57] Broad and Jenness (1997); Jenness (2001); Jenness and Grattet (2002).
[58] The social movements/social problem thesis was also advanced by other major studies, including Maroney (1998); McVeigh (et al, 2003) and Jacobs and Potter (1998).

introduction of new mechanisms for measuring race-related violent incidents. It also offers a plausible (though, I will submit, incomplete) answer to the puzzle which the 'enlightenment of racial attitudes' thesis failed to address, namely, why "hate crime" came to be perceived as an urgent social problem during the 1980s while various other unfavourable conditions disproportionately suffered by African-Americans did not. This explanation focuses on the success of the anti-hate crime movement in utilizing favourable political opportunities which were opened up by the salience of victims' rights mobilization. Such opportunities were unavailable to advocacy organizations focusing on other symptoms of racial inequality.

I would argue, however, that the narrative provided by Jenness and her colleagues is inadequate because it leaves out one crucial (and highly problematic) aspect of what made 'success' possible for the anti-hate crime movement. In contemporary American politics of crime, the concept of victims' rights is predominantly framed through a zero-sum-game formula in which the interests and needs of victims are believed to revolve around the infliction of harsher penalties on their offenders.[59] While professed commitment to victims' rights is frequently used by legislatures and interest groups in order to legitimate "tough-on-crime" sentencing and procedural reforms, non-punitive modes of thinking about the problem of victimization are being nudged out of the legislative agenda. For example, although victimization rates are particularly high among lower socio-economic stratums, the role of *class* in shaping patterns of victimization has never emerged as a central concern within the dominant American discourse of victims' rights. Likewise, in contrast with its European counterparts, the American victims' rights movement has paid little attention to demanding non-punitive modes of redress and prevention (e.g. extending social and therapeutic services to victims, or expanding public investment in crime-reductive welfare policies).[60] Hence, my critique of the social movements/social problems thesis focuses on its tendency to overlook the ideological and institutional constraints imposed on the development of anti-racist criminalization policies because of the cooptation of the anti-hate crime campaign into the broader terrain of law and order politics. I would argue that, while the strategic inclination of anti-hate crime campaigners to utilize the "opportunities" for penal populist lawmaking had enabled them to attain remarkable political support of their proposed reforms, it impeded

[59] Simon (2007a: chapter 3).
[60] Gottschalk (2006: 98-101).

their success in ameliorating the institutional and social conditions which play the most detrimental role in impeding the equal protection of African-American victims. In particular, I will show that these two structural pitfalls of dominant discourses of victims' right (obfuscation of the socio-economic dimensions of patterns of victimization, and excessive reliance on penalization) have been installed into dominant modes of framing and acting upon the problem of black victimization.

This critique of the *social movements/social problems* thesis is also useful for understanding the double edged effects of earlier campaigns of "pro-black" criminalization in American history. As I will show, the motivations which impelled legislatures and elites to introduce new regimes of "pro-black" criminalization were often associated with the intended contribution of such reforms to stabilizing particular elements within the racial status quo. Thus, to the extent that racial reformers had sought to capitalize on these opportunities, they adversely contributed to the entrenchment of these elements.

B2. The Origins of "Pro-Black" Criminalization in American History

This dissertation develops a distinct explanatory framework for expounding the conditions which enabled and constrained the emergence of new regimes of "pro-black" criminalization throughout American history. I argue that these conditions had been shaped by the interplay between three determinants: a) the extent to which prevailing social and political structures made room for the development of new forms of political mobilization around the problem of black victimization; b) the strategies used by progressive social movements while framing the political meanings of the problem; c) the existence of incentives which impelled governments, as well as social and administrative elites, to support the introduction of a new regime of "pro-black" criminalization. I will now briefly introduce these three determinants.

First, the materialization of new regimes of "pro-minority" criminalization is dependent on the extent to which prevailing political and social structures provide conditions in which social movements can attract public attention and policymakers' concern to patterns of minority victimization. Such protest, it should be emphasized, need not necessarily call for the reform of criminalization policy as its sought-after form of redress. In two crucial moments in American history (the twilight of slavery and Jim Crow), social movements

integrated the problem of black victimization as a component within campaigns for the abolition of the entire system of racial domination. Under these circumstances (as I will argue in my discussion of the third determinant), governments might enact a new form of "pro-black" criminalization in order to contain the protest of progressive movements within ideological bounds that do not necessitate the restructuring of the status quo.

In the next four chapters, I will look at how the transformation of social, institutional and ideological structures throughout American racial history had enabled and constrained the success of social movements in mobilizing around the problem of black victimization (either in demand of criminalization reforms or for advancing more radical egalitarian changes). For example, in chapter 2, I show how the intensification of regional conflicts over the economic sustainability and political legitimacy of the Southern slave economy in the antebellum era made room to the proliferation of antislavery protest in the North. Within the emerging platform of antislavery campaigning (most notably, as mobilized by the Abolitionist movement), the problem of black victimization was attached with new significance and meanings. In chapter 3, I demonstrate how, despite the dramatic elevation of the legal status of African-Americans during Reconstruction, the structural adjustments through which Southern society had re-established a new white supremacist order following the dismantling of the slavery system precluded the development of effective forms of progressive mobilization around the problem of lynching.

In chapter 4, I show how the sweeping demographic and economic shifts of the Great Migration (e.g. the concentration of the black population in urban black ghettoes, and the incorporation of black labour into the industrialized Northern economy) enabled African-Americans to establish instruments of collective action through which they could campaign for civil rights reforms. Structural economic and political shifts which crystallized in the post-WWII era (including, the rise of the Cold War, the economic boom, and the entrenchment of the New Deal vision of federal policymaking) had further facilitated the proliferation of the Civil Rights Movement, which effectively attracted national and international attention to the plight of black victims of Southern racial brutality. In chapter 5, I demonstrate how the structural shifts which took place in American politics and society from 1968 onwards (including, the collapse of the New Deal

model and the rise of neo-liberalism and neo-conservatism) had reconfigured the political, cultural and institutional conditions within which proponents of racial justice have to operate. I argue that these changes created conditions which, on the one hand, facilitated the mobilization of legislative reforms which enhanced the penalization of racist violence yet, at the same time, precluded the development of campaigns which could have spotlighted the links between the existing patterns of black victimization and other patterns of socio-economic deprivation which are disproportionately widespread among the black population.

Second, the emergence of new regimes of "pro-minority" criminalization is enabled by the strategic manner in which social movements frame the political meanings of particular forms of victimizing minorities. The study traces the different ways in which the problem of black victimization was constructed in different phases of American racial history, and considers the impact of such processes of framing on the outcomes of these campaigns. This inquiry contributes to our understanding of the way in which mobilization around the problem of victimization plays strategic functions within broader struggles for egalitarian social reform. For example, in chapter 2, I show how the Abolitionist movement had made strategic use of the problem of slave victimization in order to galvanize the opposition of Northern public opinion to the preservation of the Southern slave system. In chapter 4, I show how the Civil Rights Movement had strategically framed the problem of Southern white supremacist terror as a powerful symbol of the broader failure of the federal administration to guarantee Southern blacks' civil rights. This campaign was highly effective in prodding the federal government to introduce a new framework of "pro-black" federal legislation. However, it also entailed attendant costs (most notably, failing to mobilize the commitment of federal policymakers to eradicating the more "civilized" forms of racial domination which prevailed in the North). In chapter 5, I show how the anti-hate crime movement had reconstructed the meaning of the problem. I argue that, rather than linking contemporary patterns of black victimization with present-day structures of systemic socio-economic and political marginalization of African-Americans (e.g. the impact of the disproportionate concentration of blacks in poor urban areas on their rates of victimization to both intra-racial and black-Latino violence), this campaign had adversely reinforced the very ideological creeds through which these forms of marginalization are being legitimated.

Third, the origination of new regimes of "pro-minority" criminalization is dependent on the degree to which such reforms are believed to advance hegemonic political and economic interests. The analysis shows that, throughout American history, the introduction of new regimes of "pro-black" criminalization was responsive to new challenges of legitimation and coordination with which policymakers and social elites were confronted.[61] The popular belief in the effectiveness of criminal law as an instrument of social regulation and as a medium of political communication made criminalization a preferable form of policy response to such challenges, although it was clear that the tackling of the root causes of black victimization required structural reforms that far exceeded the introduction of new criminal statutes. This observation resonates with – and provides further historical evidence which supports – Derrick's Bell seminal argument in his 1980 article on "the interest convergence dilemma".[62] Bell argued that, although American legal and political ideologies are structured in a way which reinforces the economic and political domination of whites, they do not entirely preclude the possibility of benevolent "pro-black" legal remedies. The possibilities for such reforms are created by ad hoc convergences between the interests of blacks in the amelioration of their inferior conditions and transient interests of hegemonic political and social elites (which, in some cases, only incidentally coincide with the racial egalitarian cause). Bell's argument emphasized that, since economic and political interests which are invested in the stabilization of the racial status quo are built into (and arguably underpin)[63] American legal thinking and institutional practices, these benevolent racial reforms are prone to reinforce the structure of racial inequality (even if by means of ameliorating a particular symptom of white domination).

This mode of thinking about the conditions which enable the emergence of egalitarian reforms within broader political and legal structures which work to preclude

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[61] I use the term *challenges of legitimation* to refer to public expectations regarding the suitability of public policies to satisfty established standards of efficacy and constitutionality. I use the term *challenges of coordination* to refer to practical necessities to reconcile between competing interests (e.g. economic and political) and competing values (e.g. the tension between white supremacy and America's democratic creeds) which are affected by prevailing patterns of black victimization or by proposed legislative responses to such victimization. On the role of legitimation and coordination in shaping the attribution of criminal responsibility more generally, see: Lacey (2001: 368-371).

[62] Bell (1980).

[63] King and Smith (2008).

emancipatory revolutionary change harks backs to Marx's classical analysis of the emergence of the ("pro-worker") Factory Acts in post-1830s England.[64] For Marx, the conditions of existence of such a regime lay in its suitability to stabilize the capitalist system even if by means of reining in the interests of individual capitalists. While my analysis draws on the basic arguments elaborated by both Bell and Marx (the latter with an emphasis on class; the former with a focus on race), it seeks to highlight a theme which is more fully developed in critical race theory than in orthodox Marxist thought. Bell's writings aptly stress the extent to which the dependency of racial remedies on their intended contribution to reinforcing hegemonic interests is experienced by black activists as an uneasy strategic dilemma (rather than, as would be implied by orthodox Marxists, reflect a form of false consciousness). The tragic dimensions of this dilemma are obscured in orthodox Marxist thinking in light of the vision that a revolutionary change which would eliminate the very roots of human exploitation and alienation is achievable (or, in the more teleological versions, is inevitable). Distinctively, dominant strands of African-American thinking have always been sceptical of such a utopian and revolutionary vision of political change, and more attuned to the pragmatic compromises which had to be taken in order to ameliorate particular aspects of the black predicament.[65] As acknowledged by Kimberlé Crenshaw:

> "Critics are correct in observing that engaging in rights discourse has helped to deradicalise and co-opt the challenge. Yet, they fail to acknowledge the limited range of options presented to Blacks in a context where they were deemed 'Other' and the unlikelihood that specific demands for inclusion and equality would be heard if articulated in other terms".[66]

Accordingly, while our historical analysis seeks to pinpoint the incentives which impelled elites and legislatures to launch a new regime of "pro-black" criminalization in particular moments of American history, it also attempts not to lose sight of the valuable emancipatory dimension which these reforms entailed. This dimension lies in their contribution to providing African-Americans

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[64] Marx (1992: 389-417)[1867].
[65] This pragmatist strand is already noticeable in W.E.B. Du Bois writings on the double consciousness of African-Americans as political subjects. See: Du Bois (1996)[1905].
[66] Crenshaw (1988: 1355).

with a minimal measure of protection and respect to their human dignity (even if, in the larger scheme of things, they served to stabilize the structure of race relations).

For example, in chapter 2, I will argue that the emergence and diffusion of "pro-slave" criminalization from 1890 onwards was responsive to new economic and political challenges with which Southern elites were faced. These challenges were associated with the escalation of regional controversies over the legitimacy and economic sustainability of Southern slavery, as well as in internal changes within the Southern economy. In chapter 4, I will argue that the introduction of "federally protected activities" legislation in the 1960s was responsive to new pressures of legitimation which the federal government faced in the post-war epoch. In particular, these challenges were associated with the increasing electoral leverage of black voters in the national political arena; the damage caused to the reputation of American democracy abroad in light of the thriving of white supremacist brutality in the South; and the need to reinforce rising public expectations regarding the competence of the federal administration to solve the nation's core social problems. In chapter 5, I will argue that the introduction of hate crime laws was facilitated by the crystallization of electoral incentives which impelled politicians from both major parties to endorse this particular form (penalty enhancement) of racial reform.

To summarize, in this section, I introduced the explanatory framework employed in this study for analyzing the conditions of existence of "pro-minority" criminalization. I delineated the way in which this framework moves beyond the explanatory limitations and methodological pitfalls of the theses presented by the major socio-historical studies on the origins of hate crime laws. As noted above, the overall argument presented in this dissertation is premised on a distinction between two paths of inquiry. The first (discussed thus far) examines the conditions of existence of "pro-minority" criminalization policy; the second probes the effects which such policies produce. This distinction is attentive to the fact that the intended goals of legal reforms can never be actualized in full. Legal reforms are always prone to engender unintended consequences. The indeterminacy of legal rules, and the intervention of unforeseeable historical circumstances, might subvert the original purposes which led to the enactment of these reforms. In the next section, I move to discuss the framework used for analyzing the effects of "pro-minority" criminalization.

C. Rethinking the Effects of "Pro-Minority" Criminalization

The introduction of hate crime legislation was widely portrayed as a radical departure from a long and gory history of failures to protect African-American victims. As this study attempts to show, this portrayal is not sufficiently informed by the historical lessons of earlier epochs in which American legislatures adopted new models of "pro-black" criminal legislation. Yet it also demonstrates the prevalence of unrealistic expectations regarding the actual achievements that "pro-minority" criminalization reforms are capable of attaining. These exorbitant expectations suffuse not only the rhetoric of legislatures and advocacy organizations which are fully invested in singing the praises of hate crime legislation.[67] They are also noticeable in much of the academic literature on the topic. This is apparent, for example, in much of the normative literature which seeks to furnish a justification for penalty enhancement laws.[68] Proponents of such legislation have argued that penalty enhancement laws are warranted in order to increase the deterrent impact[69] or better to convey society's disapproval of such conducts.[70] Leaving aside the question of the normative persuasiveness of these arguments, it is arguable that they often reflect an idealized image of the actual suitability of criminal law to achieve its declared goals, either as an instrument of harm prevention (as emphasized by the utilitarian tradition) or as a communicative vehicle through which the community's moral censure is expressed (as stressed by retributive or communicative theories). In light of the partition between, on the one hand, analytic/normative criminal theory, and, on the other hand, socio-legal and criminal justice perspectives on criminalization,[71] the normative literature on hate crime has not paid sufficient attention to considering whether the institutional preconditions which are necessary for the realization of the normative justifying aims of hate crime laws are likely to be satisfied given our empirical knowledge of the modus operandi of the American criminal justice system. This problem is not unique to the context of hate crime

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[67] See, e.g. "ADL Hails Long Overdue Enactment Of Federal Hate Crime Laws As A 'Monumental Achievement For America' (http://www.adl.org/PresRele/HatCr_51/5635_51.htm).

[68] For a critical review of the normative literature on hate crime, see Hurd and Moore (2003).

[69] Levin and McDevit (1993: 217; arguing that "a strong prison sentence sends a signal to would-be hatemongers everywhere that should they illegally express their bigotry, they can expect to receive more than a mere slap on the wrist").

[70] Kahan (1996: 599); (1998: 1641).

[71] Lacey (2007: 199).

policy. It is also raised in other contexts of "pro-minority" criminalization (and indeed in various other contexts of criminal justice reforms).[72]

In this section, I will introduce an explanatory framework for analyzing the suitability of "pro-minority" criminalization to meet the expectations of progressive reformers. This introduction does not attempt to establish conclusive arguments regarding the way in which "pro-minority" legal regimes will function whenever and wherever they exist. Rather, I will try to develop a set of hypotheses regarding the institutional, cultural and political conditions which affect the achievability of the justifying aims of such reforms (as articulated by their proponents). These hypotheses draw on sociologically informed perspectives on the institutional and political functioning of criminalization in general (mostly drawn from socio-legal studies, criminal justice studies, and sociology of law). The explanatory power of these hypotheses will be examined throughout the analysis of the consequences brought about by the different criminalization regimes through which the problem of black victimization has been tackled in different historical phases. Their explanatory power with regard to the operation of "pro-minority" criminalization in other contexts of social antagonism or in other national settings will have to be examined in follow-up studies. Presumably, such a comparative project will reveal both similarities and dissimilarities across space, time, and the specific patterns of social harm which each campaign have sought to address.

Common justifications for the introduction of new categories of "pro-minority" criminal legislation usually refer to three intended goals. The first goal is to minimize the vulnerability of women and marginalized minority groups to victimization (the **preventive rationale**). The second goal is to use criminalization campaigns as tactical means within broader struggles for political empowerment and recognition. The introduction of "pro-minority" criminalization reforms serves to symbolize the official recognition of the principled entitlement of all citizens to equal enjoyment of citizenship rights, regardless of their race, gender, or sexual preferences.[73] In turn, this official recognition might serve to facilitate the mobilization of civil rights reforms in other policy domains as well (the **political empowerment rationale**). The third goal is to use criminalization campaigns in order to

[72] Lacey (2008: 13).
[73] Harel and Pachomovsky (1999: 509).

erode the legitimacy of social practices which serve to degrade and to stereotype women and minority groups. Exponents of this rationale maintain that, because criminal law serves as a medium through which societies construct their collective norms, the outlawing of forms of conduct which express white supremacist, patriarchal or homophobic degradation is likely to induce stronger public disapproval of these systems of belief (the **educative rationale**).

In what follows, I will succinctly present the core arguments which ground these three distinct rationales, and then consider some of the institutional, cultural and political dynamics which affect their achievability in the context of "pro-minority" criminalization. Before turning to this task, it is important to note that the distinction between the three rationales of "pro-minority" criminalization is employed for analytic reasons. In practice, the preventive, political and educative effects of this legislation interact with one another. Accordingly, while the theoretical analysis offered in this section attempts to pinpoint the relative autonomy of these different justifying aims vis-à-vis one another, the historical analysis which will be presented in chapters 2-5 will take a close look at the symbiotic or counteracting interactions between them.

C1. The Recourse to "Pro-Minority" Criminalization as a Vehicle of Harm Reduction

The first goal of "pro-minority" criminalization campaigns is to minimize the scope of the outlawed conduct and thereby to reduce the vulnerability of women and minorities to social harm. Criminal law is believed to be capable of reducing victimization in various ways, most directly, by deterring and incapacitating would-be offenders.[74] By subjecting perpetrators of racist violence to enhanced penalties, the anti-hate crime movement had sought to augment the deterrent and incapacitative effects of the original criminal offence. This rationale appeals to popular convictions about the instrumental efficacy of criminal law. However, a careful analysis of the institutional and cultural conditions which affect the achievability of the preventive aims of criminal legislation reveals a range of structural deficiencies which "pro-minority" criminalization regimes are likely to suffer from.

First, the revision of statutory rules for ascribing criminal responsibility or for penalizing particular forms of conduct will not necessarily be followed by the alteration of enforcement

[74] Von Hirsch and Ashworth (2009: chapters 2, 3).

practices. Nor is it certain that such reforms would be accompanied by the allocation of greater administrative and budgetary resources to the policing and prosecution of such conduct. Thus, even when legislatures are incentivized to introduce new "pro-minority" criminal offences (e.g. in order to appeal to particular groups of voters), these statutory reforms might be insulated from the institutional settings in which these reforms will be implemented. Given the bulk of empirical and historical evidence on the disparate outcomes of criminalization policies across racial, gender, and class divides, one would expect these institutional factors to be especially constraining in relation to "pro-minority" criminalization. The discussion in chapters 2-4 will depict the institutional patterns which inhibited the enforceability of "pro-black" criminalization regimes prior to the "civil rights revolution". Still, the urgent question pertains to the extent to which this problem continues to constrain the preventive effects of hate crime policies today, in an era in which overt forms of racial discrimination are no longer deemed acceptable.[75] This question will be considered in detail in chapters 5 and 6. By placing hate crime policies within the broader landscape of the administration of criminal justice in the contemporary US, I will show that this structural impediment has not been eliminated.

Current demographics of crime enforcement attest to the pervasiveness of inexorable racial disparities in virtually all aspects of the criminal process. Over the last decades, incarceration rates among African-Americans have soared. By 2006, African-Americans, who make up less than 13 per cent of the U.S. population, comprised more than half of the nation's imprisoned population.[76] The overwhelming incarceration rate of African-Americans is produced by the accumulative effect of various patterns of racially-skewed enforcement, in the fields of policing,[77] sentencing[78] and prosecutorial decision-making.[79] It is debatable whether present-day disparities in crime enforcement are rooted in relics of racial prejudice, in the enhanced susceptibility of racial and ethnic minorities to engage in illegal activities (due largely to the exclusion of large segments of the black population from the labour market of post-Keynesian economy), or in a vicious cycle

[75] Sklanky (2008: chapter 7); Loftus (2008: 758).
[76] Gottschalk (2006: 2).
[77] Harcourt (2007).
[78] Tonry (1995: chapter 2).
[79] Davis (2007: 183-195).

between these two sources.[80] What is certain is that, as long as these disparities continue to prevail, they are likely to affect the way in which the American criminal justice system processes cases of violence against African-American victims, notwithstanding the legislative declaration of their right to equal (or even special) protection. When we move beyond the narrow concept of criminalization as revolving around the formal outlawing of a particular form of conduct, and instead focus on the operation of criminalization regimes as a set of practices and processes through which social agents identify and respond to crime,[81] it is questionable whether the institutional settings which prevail in contemporary American criminal justice system are suitable to deliver the protective promise of hate crime laws. The key for ameliorating the predicament of African-American victims, I would argue, does not lie in the further enhancement of penalties (as continued to be asserted by senior policymakers, most recently, by the Attorney General of the Obama Administration).[82] In fact, it requires not only the transformation of a whole range of institutional practices which appear to be entrenched within the modus operandi of American crime enforcement institutions. It also necessitates tackling demographic and economic conditions which are positively correlated with inducing crime and disorder (whether intra-racial or inter-racial).

Within this context, it is arguable that the introduction of "pro-minority" legislation might actually perpetuate patterns of unequal enforcement. As famously argued by Kimberlé Crenshaw, in a society in which patterns of gender, class, and racial/ethnic stratification systematically intersect with one another, it is probable that legislation that specifically attempts to protect a particular minority group will be enforced in a way which correlates with general patterns of unequal enforcement and thus end up over-targeting the most marginalized groups of perpetrators.[83] As Crenshaw demonstrated, in the American case, this dynamic would typically lead to the over-targeting of poor black and Latino perpetrators of violence committed against women or against one another.[84] As I will show in chapter 5, this pitfall has been pronounced in the demographics of enforcement of hate crime legislation. Notwithstanding the egalitarian

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[80] Reiner (1992: 770).
[81] See the proposed definition of the concept of criminalization, supra note 15; see also: Lacey (2009: 943-947).
[82] "AG Holder Urges New Hate Crime Laws", **San Francisco Chronicle** 16.06.09 (http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/06/16/national/w134036D70.DTL).
[83] Crenshaw (1991).
[84] Crenshaw (1991: 1246).

message of this legislation, African-American and Latino suspects are overrepresented among those prosecuted for hate crimes.[85] As will be shown in chapter 2, a similar dynamic transpired in the antebellum era, when "pro-slave" criminalization was predominantly enforced against poor white perpetrators (whose acts of aggression toward slaves damaged the monetary interests and paternalistic prerogatives of slave-holders), while leaving the forms of racial oppression practised on a large-scale within plantations virtually unregulated.

Second, the efficacy of criminal legislation is crucially dependent on the degree to which the values it embodies are buttressed by informal social controls and endorsed by the bulk of the population. Processes of criminalization involve the participation of multiple social actors, including both ordinary citizens (e.g. victims and witnesses) and professional agents throughout various stages of the criminal process.[86] These agents inevitably employ their personal values and subjective judgments while considering whether to classify a particular conduct as a "crime" and whether to facilitate the processing of such conduct by policing, prosecutorial, and judicial institutions. Thus, "pro-minority" criminalization cannot serve as a vanguard force of social change. The egalitarian values which this legislation conveys will be effectively enforced only if they resonate with widespread social norms, because these norms shape the systems of epistemological and normative assumptions which inform the interpretation of the behaviour under scrutiny.[87] To be sure, these systems of values are never fixed or impervious to transformative forces. Thus, the extent to which specific "pro-minority" criminalization regimes are likely to suffer from this pitfall will vary from one context to another. However, as my analysis will show, this problem has been repeatedly pronounced even in times in which racial norms appeared to undergo significant transformations.

Thirdly, criminalization reforms often serve to displace alternative forms of policy intervention which might be more effective in minimizing the vulnerability of minority groups to victimization. As Nicola Lacey and her colleagues point out, although "empirical evidence suggests that the reductive effects of criminal processes...are meagre, and casts doubt on the validity of characterising criminal law primarily in instrumental terms...it may be that a widespread *belief* in the instrumental efficacy and necessity of criminal law is

[85] See figures in chapter 5, section E1.
[86] Lacey (1995).
[87] Lacey (1995: 8).

something which typically underpins its existence".[88] Because the introduction of new criminal laws dramatize politicians' commitment to eliminate the problem, policymakers are incentivized to prioritize the launching of new regimes of "pro-minority" criminalization vis-à-vis the sponsoring of "softer" instruments of policy intervention. However, with regard to many aspects of minority victimization, it is the latter type of reforms (e.g. greater spending on educational schemes for promoting intergroup tolerance) which are likely to produce long-term impact on these patterns of offending and victimization.

As I have argued elsewhere, the structural shifts which took place in American politics throughout the last three decades have increased the likelihood that populist forms of "pro-minority" criminal lawmaking would come to displace the development of non-punitive policy measures.[89] Over the last decades, electoral incentives to conform to a "tough on crime" posture have become more decisive.[90] The heavier dependence of the two major parties on the support of floating, median voters had increased the leverage of single-issue organizations which frame their demands around the problem of victimization.[91] In response, politicians are increasingly inclined to opt for symbolic (and excessively harsh) penal responses to problems of minority victimization, even when criminological research warns against the futility or even counter-productiveness of such policies.[92] At the same time, the development of welfarist responses which might be better equipped to alleviate the socio-economic underpinnings of these forms of victimization has been considerably constrained by the declining political support of social-democratic welfarism.[93]

My analysis will show that, although the forms which this structural pitfall has taken throughout the unfolding of the hate crime campaign reflected the historical contingencies of the day (i.e. the impact of neoliberal thinking on post-1980 public policy), the tendency of criminalization reforms to displace the development of more structural policy solutions had also been noticeable in earlier stages of American racial history. At root, this stemmed from the reluctance of governments to invest political capital in

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[88] Lacey, Welles and Quick (2003: 10).
[89] Aharonson (2010: 17-19).
[90] Lacey (2008: 75); Simon (2007a: chapter 3).
[91] Lacey (2008: 68-70).
[92] See, in the context of feminist campaigns against domestic violence and stalking, Bummiler (2008).
[93] Beckett and Western (2001).

attempting to abolish the structural mechanisms which produced the criminogenic conditions within which the victimization of African-American had flourished. Thus, for example, antebellum Southern legislatures opted for penalizing individual cases of abusing slaves while relentlessly opposing any meaningful attempt to abolish slavery or to confer civil rights upon slaves. It was clear, however, that as long as the large-scale mechanisms of economic exploitation, dehumanization, and political repression that the slavery system amalgamated remained in force, these criminalization reforms could not have significantly minimized the suffering of African-American victims.

Fourth, it is important to recall that, even when "pro-minority" criminalization reforms succeed in minimizing the vulnerability of minority groups to particular forms of harm (e.g. those which are conceptualized as "hate crimes"), their suitability to reduce other harmful experiences to which marginalized minorities are disproportionately exposed are meagre. As Paddy Hillyard and his colleagues have argued, the concept of *crime* in intrinsically flawed in its suitability to encompass some of the gravest forms of harm to which individuals are subjected, not least, the large-scale mechanisms of harm production that are built into the modus operandi of the market economy and of the bureaucracies of the modern State.[94] This "zemiological" approach can be usefully applied for thinking about the limited suitability of the concept of "hate crime" to encompass the variety of economic, social and political disadvantages to which African-Americans are disproportionally exposed in post-Keynesian American economy. A similar observation can be applied for analyzing the shortcomings of the legal categories used in earlier historical regimes of "pro-black" criminalization (such as "slave abuse" or "federally protected activities") for capturing the massive mechanisms of harm production built into the systems of slavery and Jim Crow. As I will further argue in my critique of the *political empowerment* rationale, because "pro-minority" criminalization serves to reinforce public trust in the commitment of American law to minimizing the role of *race* in shaping individuals' vulnerability to social harm, legislative reforms in this field might obscure the persistence of the large-scale mechanisms of racially-skewed harm production which cannot be effectively framed in terms of "criminal wrongs" (e.g. because they cannot be attributed to the voluntary acts of an individual perpetrator or cannot be policed effectively).

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[94] Hillyard (et al, 2004).

C2. The Recourse to "Pro-Minority" Criminalization as a Vehicle of Political Empowerment

The second justifying aim of "pro-minority" criminalization campaigns is to serve as vehicles of political empowerment. These campaigns seek to call upon the State to recognize its normative commitment to provide members of minority groups with adequate protection from violence. The attainment of such official recognition is believed to constitute an independent goal of progressive politics. It is argued that, even if this declaration fails to be translated into effective enforcement policies, it nevertheless signals an intrinsically valuable message and provides a critical standard against which the performances of the criminal justice system can be measured. [95] In addition, and again, independently of their success in preventing crime, these campaigns might serve as tactical means within broader struggles for political empowerment. By calling attention to the suffering of minority victims and showing that their experiences are symptomatic of broader patterns of governmental neglect and discrimination, progressive social movements seek to galvanize public support for the extension of civil rights not only in the penal sphere but also in other domains of public policy.

Over the last decades, the literature on the politics of crime has paid close attention to the strategic uses of political mobilization around the problem of victimization within grassroots and electoral campaigns. My analysis in chapter 5 draws on this literature by showing how these new forms of progressive mobilization transformed the way in which the problem of black victimization has been tackled in post-1980 American politics. However, the dissertation also gives focus to two issues which are relatively underdeveloped in the existing literature. First, it extends the conventional historical prism and looks at the way in which problems of victimization had been framed in earlier periods of American history;[96] second, whereas much of the literature has focused on the role of victims' rights campaigns in furthering conservative reforms (e.g. curtailing

[95] For a justification of hate crime laws on the ground of the intrinsic merit of its expressive function, see Lawrence (1999: 153).

[96] In this context, I take my cue from the important works such as Bosworth (2009: chapters 1, 2); Gottschalk (2006: chapter 3); Miller (2008: chapter 2). These studies have demonstrated how long-term historical transformations which hark back to the early Republican or even the colonial era laid the ideological and institutional foundations for contemporary practices in the fields of criminalization and imprisonment.

procedural rights; harshening penal policies; and legitimating the expansion of the State's power to incarcerate),[97] this study focuses on campaigns which would normally be characterized as progressive (in the sense that they mobilize around the grievances of marginalized minority groups). Accordingly, the study's original contribution to this literature is twofold. First, I offer a comparative historical prism for examining how contemporary forms of mobilizing around the problem of victimization both extends and deviates from the forms used in earlier historical periods; second, I explore how the convergence between conservative and progressive agendas throughout the framing of the hate crime campaign have shaped its character and outcomes.

The tactical incorporation of criminalization campaigns within broader egalitarian struggles seeks to utilize the symbolic qualities of victimization as a powerful metaphor of human vulnerability. "Pro-minority" criminalization campaigns typically spotlight the most overtly violent and obviously appalling behavioural expressions of discriminatory norms that are manifested in more "civilized" manner by various other social and institutional practices that are deemed legitimate and non-coercive. For example, at the same time that the anti-lynching campaign was gaining ground throughout the first half of the twentieth century, various forms of symbolizing blacks' inferior status (embedded both within the Southern system of Jim Crow and within the Northern structure of race relations) were still regarded as legitimate and non-coercive. This might explain a peculiar historical pattern: throughout American history, "pro-black" criminalization campaigns were successful in generating policy reforms even in times in which public opinion relentlessly rejected other progressive campaigns which sought to ameliorate the social and political conditions of African-Americans. For example, as shown in chapter 2, the scope and range of criminal laws prohibiting "slave abuse" was significantly expanded between 1830 and 1865, at the same time in which Southern governments erected harsher restrictions on manumissions and criminalized campaigning for Abolitionism. As will be argued in chapter 5, the anti-hate crime campaign had gained momentum in the very same decade in which American society was willing to tolerate an unprecedented increase in the number of African-Americans behind bars and a marked exacerbation of various other indicators of social

[97] E.g. Dubber (2002: chapters 1-3); Weed (1995); Elias (1993); Henderson (1985).

marginality.[98] These examples imply that, even if proponents of hate crime laws are correct in observing that such laws cement social solidarities with the suffering of victims who belong to minority groups,[99] it is questionable whether these forms of solidarity are firm enough for spurring public support of structural egalitarian reforms (even when such reforms are needed for eradicating the root causes of these forms of victimization). "Pro-minority" criminalization campaigns can gain political support even in times of limited receptiveness to structural egalitarian reforms because they tend to circumvent the fiercest ideological controversies on the agenda of racial reformism and to spotlight individual cases of unjustifiable racial brutality. However, this very feature inhibited the success of these reforms in serving as potent vehicles of 'consciousness raising' and galvanizing public support for wider egalitarian reforms.[100]

In part, the intrinsic limits of "pro-minority" criminalization campaigns as vehicles of egalitarian political reform stem from their susceptibility to being expropriated as a means of legitimating the purported adherence of State institutions to principles of racial fairness and equal protection. By endorsing criminalization campaigns, governments are provided with a favourable instrument for manipulating the political meanings of existing patterns of minority victimization. Because criminal law is, in essence, a mechanism which governs the attribution of individual blame for the materialization of social harm, the construction of social problems as instances of "crime" tends to spotlight the responsibility of the individual perpetrator to the injury suffered by the victim,[101] and to present his actions as deviant. It is important to acknowledge that the focus on holding individuals accountable for the harmful consequences of their wrongful actions should not be seen as a mere sham since it addresses a warranted moral concern with the role of agency in producing social harm.[102] Hence, the individualistic tilt of criminal law need not necessarily preclude the suitability of "pro-minority" criminalization to serve as a catalyst for stimulating public debate on the

[98] Wilson (2009: chapters 2, 3).
[99] Lawrence (1999: 163).
[100] The idea that legal campaigns should serve as vehicles of progressive 'consciousness raising' was classically articulated by Catherine MacKinnon (1991a: 83-105). MacKinnon's pioneering scholarship continues to inspire various "pro-minority" criminalization campaigns at both national and international contexts.
[101] As Alan Norrie (2001: 223) shows, in orthodox criminal law thinking, this mode of construction "operates to seal off the question of individual culpability from issues concerning the relationship between individual agency and social context".
[102] Norrie (2000: 61-62; 85-86).

complicity of the State in breeding the criminogenic conditions within which these forms of minority victimization thrive. However, it will be shown, this potential was not often materialized throughout American racial history. More frequently, the focus of such campaigns on spotlighting extreme manifestations of white supremacist brutality served to divert public attention from the large-scale economic and social forces which shaped these patterns of brutality and to obfuscate the harmfulness of "non-criminal" forms of social injury to which African-Americans were disproportionately exposed. Paradoxically, then, the very success of "pro-minority" criminalization reforms might serve to de-radicalize the struggle for social equality.

Along these lines, the dissertation will make a twofold distinctive contribution to the sociological literature on the role of piecemeal progressive reforms in legitimating broad systems of social inequality. First, in the analysis of the historical driving forces which led to the materialization of new regimes of "pro-black" criminalization, I will consider the role played by pressures of legitimation in impelling legislatures and elites to establish these new legislative frameworks. Second, in studying the effects of "pro-minority" criminalization regimes, I will look at the distinct contribution of these regimes to reinforcing public trust in the legitimacy of racial relations. Overall, I will show that "pro-black" criminalization policy has served as one of the major ideological vehicles through which political authorities have reconciled America's self-image as a beacon of democratic and meritocratic values with its actual patterns of racial stratification.

C3. The Recourse to "Pro-Minority" Criminalization as an Educative Instrument

The third justifying aim of "pro-minority" criminalization policy is to serve as an educative instrument that works to de-legitimate degrading and discriminatory social norms. The *educative rationale* draws on a broader jurisprudential view which characterizes law as a communicative vehicle which induces individuals not only to obey a shared set of behavioural standards but also to recognize their normative force.[103] This approach depicts criminal law as a cultural medium which not only mirrors society's fundamental moral values but also (as stressed by Durkheim) strengthens the emotional attachment of community members to these values.

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[103] Burge-Hendrix (2007: 250).

One of the most subtle formulations of the educative rationale can be found in E.P. Thompson's modification of the Neo-Marxist critique of the rule of law.[104] Thompson agrees with the Marxist premise that, at the macro-structural level, the mediation of class relations through the forms of law serves to de-politicize and thus to naturalize social inequality. However, he stresses, from the perspective of its influence on the lived experiences of individual agents, the need to interpret social relations in the shadow of the law introduces a set of ethical constraints which delimit the behavioural forms through which social domination can be legitimately practised. Accordingly, it could be argued that, insofar as everyday interracial interactions had indeed been bargained in the shadow of the law, such legislation worked to erode the perceived legitimacy of these particular forms of racial degradation, and, to some extent, to challenge the arbitrariness of racial domination at large.

The educative rationale is one of the most salient in the literature on the philosophical foundations of hate crime laws.[105] However, advocates of hate crime legislation often refer to its ability to transform racist attitudes as a probable outcome which would follow mechanistically from the formal act of lawmaking. In contrast, this study attempts to scrutinize the social and institutional preconditions which are necessary for the delivery of the educative function of "pro-minority" criminal laws. I will show that the success of "pro-minority" criminal legislation in transforming racist attitudes is dependent on a variety of cultural factors within the social landscape in which these laws are applied. These factors include not only racial attitudes, but also broader modes of thinking about the role of law within the social order. In particular, I will show that the normalization of vigilantism and the contested legitimacy of constitutional norms in Southern political culture had considerably constrained the success of "pro-black" legal reforms in alleviating racist practices and institutions.

My historical analysis will show that "pro-black" criminalization reforms did not bring about dramatic changes in American race relations. In fact, the implementation of such legislation has more often mirrored prevailing racial norms and sensibilities than it had called them into question. This reflects a structural aspect of processes of criminalization: their

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[104] Thompson (1976).
[105] Hurd and Moore (2003: 1111).

dependence on the exercise of discretion by both institutional actors and lay citizens while engaging in interpretive practices through which they identify and respond to "crime". In deciding whether to classify a particular conduct as a public wrong and as warranting the imposition of penal sanctions on its perpetrator, these interpretive practices are likely to reflect dominant cultural assumptions and popular prejudices. This observation has important implications not only for the constraints that a racist culture impose on the crime preventive merits of such legislation (as noted earlier in our discussion of the *preventive rationale*). It also puts at stake the suitability of such legislation to challenge the fundamental premises of deep-seated cultural convictions about race (although, as noted above, it might be able to moderate their prevalent forms of permissible expression). Indeed, it may be that when political, social and economic forces have already pushed society toward the moderation of racial animus, such legislation would become more capable of fulfilling its potential as an educative instrument. Yet, this observation only reaffirms the view that social movements should focus their efforts on non-legalistic forms of mobilization, and should eschew prioritizing criminalization campaigns as major strategic vehicles.

D. Outline of the Dissertation

Let me conclude this introductory chapter by delineating the main questions and historical theses presented throughout this study. In the next four chapters, I explore the origins and effects of the criminalization regimes through which the problem of black victimization was tackled in four distinct eras of American racial history. The sixth chapter of this study will summarize the theoretical implications of this historical analysis for our analysis of the intrinsic limitations of "pro-minority" criminalization.

In **chapter 2**, I explore the historical evolution of legal responses to the victimization of African-Americans by white offenders in the colonial (1619-1790) and antebellum (1790-1865) periods. The chapter shows that, throughout the antebellum period, Southern legislatures and courts developed a body of law which was specifically designed to protect slaves from abuse. The fact that antebellum Southern legislatures and elites chose to establish a legal framework for restricting the forms and measure of coercion that could be legitimately inflicted upon slaves poses a challenge to conventional theories of the conditions under which "pro-minority" criminalization reforms are

likely to be materialized. After all, this legislative reform gained momentum in a period in which African-Americans were relentlessly deprived of any form of influence on public policy.

The chapter addresses two main questions. First, what were the driving forces which led to the origination of "pro-slave" criminal legislation in the late eighteenth century and to its accelerated development throughout the final decades of the antebellum period? Second, what were the preventive, political and cultural effects which this legislation brought about?

The discussion probes how the forms of behaviour that were legally recognized as constituting "slave abuse" impaired hegemonic economic and political interests which were protected by Southern law. It then traces the various functions of coordination and legitimation played by the "pro-slave" criminalization regime within the Southern political and social order. These functions included: enforcing the monetary interests and paternalistic prerogatives of slaveholders; relieving pressures of competition which would have thrived in a completely unbridled slave economy; preserving the fitness and hence the productivity of the labour force; and legitimating the institution of slavery in the face of Abolitionist protest by presenting plantation practices as bounded by principles of legality and fairness. However, the analysis emphasizes that, although this legal regime had served to stabilize the institution of slavery at the macro-structural level, it nevertheless provided slaves with a certain measure of protection. By considering the extent to which this criminalization regime was suitable to satisfy the institutional and cultural conditions that were necessary for securing its effective enforceability, I explain why this regime failed in meeting its stated aims. I conclude by drawing the lessons of this failure for our understanding the limits of present-day "pro-black" criminalization policies.

In **chapter 3**, I explore the way in which the problem of black victimization was debated and acted upon throughout the Reconstruction (1865-1877) and post-Reconstruction (1877-1909) eras. The chapter shows that the ebb and flow of "pro-black" criminalization policy during these decades reflected the broader transformations which came to pass in American racial politics. In the early 1870s, the federal government established new mechanisms for prosecuting Klan terrorists. However, with the collapse of Reconstruction, this short-lived experiment of federal "pro-black" criminalization

policy had been dismantled. In defiance of the expectations which accompanied the tremendous legal empowerment of African-Americans during Reconstruction, the late nineteenth century was characterized by the marked deterioration of American race relations. The radicalization of Southern white supremacist consciousness found expression both in the thriving of new forms of ritualized racist violence and in the manifested abdication of enforcement responsibilities by Southern authorities. At the same time, the federal administration refrained from utilizing its new powers to prosecute white supremacist perpetrators under the Enforcement Acts of the Reconstruction Amendments.

Accordingly, the chapter focuses on two main questions. First, why was the formal equalization of African-Americans' constitutional rights followed by the retreat of both Southern and national authorities from assuming responsibility to preventing white supremacist violence? Second, how did the de facto de-criminalization of racist violence throughout this era interact with the cultural and political processes through which Southern society has moved from one system of racial domination (slavery) to another (Jim Crow)?

My analysis focuses on the way in which a cluster of structural transformations which took place at both the national and regional political arenas had removed the incentives which prodded federal and Southern authorities to engage in "pro-black" criminalization policymaking throughout earlier decades. In light of the increasing electoral leverage of poor whites, on the one hand, and the alleviation of the economic interests and paternalistic sentiments which impelled Southern elites to support such legislation in earlier periods, on the other hand, post-Reconstruction Southern politics became relentlessly unreceptive to any form of benevolent "pro-black" mobilization. The discussion emphasizes that, in theory, the introduction of a new regime of "pro-black" criminal legislation could have served to legitimate salient aspects of the Southern political order. For example, it could have reinforced Southern states' claims to monopoly over the use of legitimate means of coercion, a prerogative which was openly defied by the thriving of public torture lynching rituals. In addition, such legislation might have served to legitimate Jim Crow by means of portraying it as capable of accommodating fundamental principles of racial fairness and respect to human dignity. However, I show that the pervasiveness of white supremacist sentiments in post-Reconstruction culture and politics impeded the development of virtually any form of grassroots or electoral mobilization around the problem of

black victimization. In the national political arena, the collapse of the first regime of federal civil rights criminalization policy reflected the general reluctance of post-Reconstruction federal governments to keep and invest political capital and administrative resources in guaranteeing Southern blacks' civil rights. This retreat echoed a paradigm shift in prevailing constitutional and political understandings of the appropriate (minimal) role of the national administration in governing Southern race relations. The chapter demonstrates how the de facto de-criminalization of white supremacist violence served as a salient vehicle through which the inferior status of African-Americans was buttressed even under conditions of formal equal membership in the nation's constitutional order. It concludes by delineating the major lessons which the nadir of "pro-black" criminalization in the late nineteenth century presents for our current thinking about the role of criminal law in mediating racial conflicts.

In **Chapter 4**, I look at the transformation of public debate and policymaking on the problem of black victimization from 1909 to 1968. This period commenced with the founding of the NAACP, which spearheaded the campaign against white supremacist violence for the next six decades. It concluded with the establishment, between 1964 and 1968, of a new legislative framework for federal prosecutions of violent interferences with blacks' civil rights. After nearly eight decades in which the federal administration insisted that the authority to penalize white supremacist terror laid within the exclusive jurisdiction of state governments, a significant policy U-turn transpired from the late 1950s. This development unfolded with the dispatching of federal troops to Little Rock, Arkansas in 1957, in the wake of a constitutional crisis provoked by the refusal of Southern authorities to enforce desegregation orders issued by federal courts. The new approach was consolidated between 1964 and 1968, with the enactment of a new legal framework for criminalizing interferences with a range of "federally protected activities" (e.g. voting, enrolling in public schools, and jury service).

This historical trajectory presents two sets of questions. First, what led the federal administration to abandon its previous position and to reclaim its authority to criminalize racist violence in this particular historical moment? Second, did the enactment of "federally protected activities" legislation contribute to minimizing the patterns of black victimization in the South and nationwide (and if so, how)? What were the short term and long term political impacts of the revival of federal "pro-black" criminalization policies in the 1960s?

My analysis shows that the new forms of mobilization around the problem of black victimization were embedded within the broader strategies devised by the Civil Rights Movement for challenging the legitimacy of Jim Crow. The Movement effectively reconstructed the meaning of the problem of black victimization as a powerful symbol of the broader failure of the national administration to guarantee the basic citizenship rights of African-Americans in the South. The forces which had impelled the federal government to establish a new legal framework for addressing these challenges of legitimation were facilitated by three seismic historical processes which culminated in the post-war years. First, throughout the Great Migration, millions of African-Americans who were hitherto precluded from exercising their right to vote (de facto if not de jure) were incorporated into the Northern (and thus into the national) electorate. The increasing leverage of the black vote prodded the two major national parties to invest greater political capital in sponsoring civil rights reforms and to revisit their traditional position on the question of anti-lynching legislation. Second, with the intensification of Cold War pressures to polish the image of American democracy abroad, the impact of racist incidents on the nation's international reputation emerged as a salient consideration in shaping national civil rights policy. Third, from the launching of New Deal policies in the 1930 and increasingly in the post-war years, the federal government had vastly expanded its institutional capacities and spheres of operation. The establishment of federal jurisdiction over the regulation of Southern racial practices facilitated the efforts of the national administration to establish itself as a key policymaker in the criminal justice field (not least, by means of demonstrating the shortcomings of states' rights ideology).

In the latter two contexts, the creation of the new framework of federal "pro-black" criminalization was enabled by the contingent convergence of interests between the Civil Rights Movement and the federal administration. Through spotlighting the brutal methods used by Southern authorities and mobs for suppressing non-violent civil rights protest, the Movement's strategic mobilization around the problem of black victimization had boosted public demand to expand the powers of the national administration vis-à-vis state governments. This interpretation of the conditions which enabled the emergence of this new regime of "pro-black" criminalization provides a useful context for rethinking the effects of this reform both on the patterns of black victimization and on American racial consciousness. The Movement's strategic focus on the forms of victimization which were prevalent in the South had boosted its success in bringing Northern

public opinion to support its immediate reformist goals (i.e. the abolition of Jim Crow, and the solidification of federal legislation in the fields of voting and equal opportunity rights). Yet this strategy had failed to foster political commitment to eliminating the distinct patterns of victimization which were pervasively suffered by African-Americans in the North. These patterns (which increasingly included intra-racial violence) were no longer shaped by traditional forms of white supremacist animus. Rather, they were nurtured by the demographic concentration of the black population in urban ghettoes blighted by devastating rates of poverty and crime. This failure is paradigmatic of the limited success of the Civil Rights Movement in galvanizing firm political commitment to eliminating the distinct forms of racial inequality which permeated Northern society and economy. I will argue that the achievements and the pitfalls which emanated from the Movement's strategic mobilization around the problem of black victimization illustrate the unique qualities as well as intrinsic limits of social movements' recourse to victim-centred mobilization while campaigning for egalitarian political reforms.

In **Chapter 5**, I look at the way in which the problem of black victimization had been reframed and acted upon in the post-civil rights era (1968 to date). The defining development of this era was the advent of hate crime laws. This framework differs from earlier regimes of "pro-minority" criminalization in various ways, three of which are of particular importance. First, hate crime laws give focus to the idea of penalty enhancement as the primary remedy to the age-old problem of the inadequate protection of African-American victims. Second, in contrast with the "federally protected activities" legislation of the 1960s and with the civil rights criminalization policies of the 1870s, hate crime legislation did not emerge as part of a broader framework of comprehensive civil rights reforms. Accordingly, whereas these two earlier criminalization regimes were perceived as instrumental tools for guaranteeing the ability of African-Americans to participate in the political process or in civic and economic activities, hate crime laws frame the victim's right to be free of racist harm as a self-contained entitlement. Furthermore, these laws frame the meaning of the victim's rights as revolving around (and vindicated by) the infliction of harsher penalty upon the offender. A third distinct feature of hate crime laws is that, in contrast with earlier regimes of "pro-black" criminalization, they have gained bipartisan and cross-regional political support. The popularity of hate crime legislation is particularly noticeable since it emerged in a period in which the development of various other civil rights campaigns had been hindered amid the ascending of neo-liberalism as a dominant

framework of economic policymaking and the salience of neo-conservatism in fomenting the ideological opposition to state-sponsored egalitarian reforms.

The inquiry into the origins and effects of this most recent form of "pro-black" criminalization policy focuses on two sets of questions. First, why did the new framework of hate crime policy emerge in the 1980s? Second, have these reforms been successful in providing the criminal justice system with better tools for minimizing the plight of African-American victims? What are the political messages which hate crime legislation has conveyed? To what extent have these messages effectively spotlighted the interrelations between contemporary patterns of black victimization and broader patterns of racial inequality in contemporary American society?

The analysis sets off by looking at how structural shifts which took place in the organizational and ideological forms through which the struggle for racial equality has been mobilized since the late 1960s reshaped the dominant forms of strategic mobilization around the problem of black victimization. Over the last four decades, the field of black activism has been reconfigured following the decline of grassroots mobilization and mass protest as the primary vehicles through which African-American activists seek to initiate policy reforms. Instead, the struggle for racial equality has come to be dominated by a plethora of single-issue advocacy organizations. Unlike the dominant organizational components of the Civil Rights Movement, these single-issue organizations do not necessarily espouse a shared or indeed coherent vision of egalitarian reform. This constellation seems potentially conducive to the development of a more diversified spectrum of racial egalitarian reformist projects (including projects which focus on the problem of black victimization). However, it also provides social movement organizations with stronger incentives to frame their demands in accordance with hegemonic political and media discourses in order to maximize their influence on public opinion and to secure policymakers' support. By placing hate crime policy within this context, we can gain a better understanding of the forces which shaped its three distinct features (as depicted above). The focus on sentencing enhancement as the professed solution to the problem of black victimization sought to capitalize on the fecundity of determinate sentencing reform as a dominant model of criminal lawmaking. The insulation from a broader agenda of civil rights reform, and the framing of the rights of black victims as revolving around the infliction of

harsher penalties, mirrored the dominant ideological forms whereby the interests of victims (or, more precisely, of the symbolic figure of the Victim as a idealized political subject) have been constructed in post-1980 American politics of crime. And the overwhelming bipartisan support of such legislation stemmed from its serving as a point of convergence between, on the one hand, conservative concerns with law and order, and, on the other hand, liberal attempts to reframe egalitarian ideals in accordance with a 'tough on crime' posture.

Based on this interpretation of the conditions of existence of hate crime policy, I show that its inherent limitations reflect the broader institutional flaws and counter-egalitarian ideological creeds of the generic models of criminal lawmaking upon which this policy is based. In analyzing the suitability of these reforms to provide the criminal justice system with more effective tools for tackling the problem of black victimization, I argue that the focus on sentencing enhancement was misplaced and in some respects counterproductive. This critique draws on the literature on the generic institutional shortcomings of determinate sentencing policies in meeting their two major aims: increasing deterrence and minimizing the opportunities for discriminatory exercise of discretion by law enforcers. In examining the suitability of hate crime reforms to mobilize pubic awareness to the nexuses between contemporary patterns of black victimization and structural patterns of racial inequality, I argue that the cooptation of this campaign into the broader framework of populist "tough on crime" policymaking have been detrimental in two major ways. First, it obfuscates the extent to which contemporary patterns of black victimization are driven by problems of class (i.e. the disproportionate concentration of African-Americans and Latino-Americans in poor and disintegrated urban ghettoes), rather than traditional forms of white supremacist animus. Second, it overstates the extent to which harsher and more determinate penalization indeed provides an effective solution to the problem. The development of more effective responses to the plight of black victims, I conclude, can only evolve within a new conceptual framework for thinking about the symbiotic relationship between race, class and victimization.

In **chapter 6**, I discuss the major conclusions of the study and indicate its contribution to the historical literature on the intersections of crime, race and politics in American history, and to the sociological literature on the conditions which enable and constrain the pursuit of egalitarian social change through legal mobilization.

Chapter 2:

"Law to Him is Only a Compact between his Rulers": The Development of "Pro-Slave" Criminalization in the Colonial and Antebellum Eras

> *A Freeman would have a right to demand that the law should be pointed to...but a slave can invoke neither Magna Charta nor common law...law to him is only a compact between his rulers, and the questions which concern him are matters agitated between them.*
>
> *South Carolina Court of Appeals [1847]* [1]

A. Introduction

This chapter explores the historical evolution of legal responses to the victimization of African-Americans by white offenders in the colonial (1619-1790) and antebellum (1790-1865) periods. It sketches the contours of the body of law which was developed by Southern legislatures and judges for governing the permissible treatment of slaves both in plantations and in the public sphere. It then offers an interpretation of the political and social forces which shaped the character of these legal responses, considers the political and social effects which they produced, and discusses some of the broad sociological and socio-legal lessons which this case study provides.

As in many other policy debates concerning racial justice, the imprints of slavery continue to play a salient role in shaping present-day views regarding the appropriate legal responses to bigotry-motivated violence.[2] Yet the dominant mode of drawing the lessons of slavery in both policy and scholarly debates on hate crime is simplistic in both its descriptive and prescriptive dimensions. The major descriptive flaw lies in the common tendency to neglect the considerable body of legislation and jurisprudence developed by antebellum Southern legislatures and judges, prohibiting particular forms of abusing slaves. In turn, this neglect narrows down the range of policy and normative implications that are usually drawn from this painful chapter of America's racial history. Most importantly, evidence of the

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[1] Ex parte Boylston, 33 *S.C.L.* 20, at 43 [1847].
[2] Franke (2000: 1679).

brutality of the American slave system is often deployed in hate crime debate in order to dramatize the need to adopt harsher penal responses to bigotry-motivated violence, rather than (as I will propose in this chapter) as an illustration of the limited power of legislative reforms to protect marginalized minorities as long as the economic, cultural and institutional structures which produce their victimization remain intact.

In this chapter, I advance a more complex understanding of the enduring significance of slavery to our current thinking about the root causes of – and required policy responses to – the problem of minority victimization. Rather than adducing the legacy of slavery to advocate a particular policy solution, I aim to use it as a comparative prism through which we can subject to critical scrutiny the dominant ideas and practices which shape hate crime policies. Our analysis will show that the failure to protect African-Americans in the antebellum era did not stem from the lack of applicable criminal rules (as usually contended by advocates of expanding hate crime legislation). Rather, it derived from the way in which the racialized character of crime enforcement practices inhibited the realization of the protective principles which the applicable criminal legislation conveyed. This diagnosis is highly relevant for informing our critical thinking about the limitations of hate crime policies in an era in which racial disparities in the administration of criminal justice are still pervasive (and arguably have exacerbated in recent decades).[3] As my analysis in the fifth chapter will demonstrate, the main problem which obstructed the enforceability of "pro-slave" criminal legislation continues to impede the ability of the American criminal justice system to provide African-American victims with equal protection, even after the remarkable expansion of anti-racist legislation (in the form of hate crime statutes). At root, the limitations of both "pro-slave" and hate crime policies stemmed from their being implanted within institutional and ideological structures which were fully invested in the stabilization of existing patterns of racial inequality. Under these circumstances, "pro-minority" criminalization is not only highly constrained in its ability to protect its assumed beneficiaries. It is also prone to reinforce the very structures of social inequality which produce these forms of victimization, and thus to perpetuate the very problem which it purports to eliminate.

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[3] Western (2006: chapter 1).

My analysis sets off by introducing the structure of the legal system within which laws governing the victimization of slaves were embedded, and the social and political functions which this system had played. In **section B**, I present the defining features of colonial and antebellum slave law and place this legal framework within its social and political context. In **section C**, I depict the remarkable paradigm shift which transpired throughout the transition from the colonial period to the antebellum period with regard to the protection of slaves in Southern criminal law. I will show that, from the late eighteenth century onwards, Southern criminal law had increasingly recognized slaves' right to legal protection.

In **section D**, I look at the driving forces which impelled this development. I argue that the emergence of "pro-slave" criminal legislation in the antebellum period was responsive to new challenges of coordination and legitimation which Southern elites and governments had confronted in the post-Revolutionary decades. These challenges were associated with the need to keep in check the crisis tendencies inherent in the polarized class structure of antebellum Southern society and to contain the interregional conflict over the constitutional legitimacy and moral defensibility of slavery. The discussion identifies the way in which instances of slave abuse posed a threat to the political and economic stability of the slavery system, and examines the way in which the introduction of new "pro-slave" legislation was deemed useful for tackling these challenges of coordination and legitimation.

In **section E**, I analyze the preventive, political and cultural effects of "pro-slave" criminalization policy. I consider the institutional and cultural determinants which affected the suitability of these legislative reforms to meet their declared aims and to provide slaves with adequate protection from violence. I then draw the major lessons provided by this case study with regard to the conditions which enable and constrain the mobilization of egalitarian social change through "pro-minority" criminalization reforms. This analysis demonstrates the double-edged functioning of "pro-minority" criminalization reforms. I argue that, contrary to the accepted lore in hate crime debates, antebellum Southern law did not entirely neglect the victimization of slaves. The legal recognition of the entitlement of slave victims to equal protection worked to reinforce the social recognition of slaves' dignity as human beings, and, to some extent, to restrain the forms of brutality to which

they were subjected. At the same time, this legislation served to stabilize the institution of slavery both by reinforcing the monetary interests of slaveholders and their patriarchal prerogatives and by presenting slave law as receptive to principles of fairness and justice.

B. The Structure of Slave Law in its Social Context: An Introduction

African slaves arrived in what would become the United States in 1619, less than fifteen years after the founding of the first English colony in Jamestown, Virginia.[4] However, the process whereby racial categories gained political significance and became legally codified was gradual and took its definite shape only by the late seventeenth century.[5] Throughout the early colonial period, blacks were usually regarded as indentured servants. Their bondage typically lasted for several years and was governed by the same social conventions which applied to European servants.[6] Being primarily driven by efforts to exploit the economic opportunities offered in the New World, the majority of slave labour came to concentrate in the Deep South, where it was mainly used to cultivate tobacco, rice and indigo.[7] Alongside the increasing dependency of the Southern economy on black labour, racist ideologies which justified the institution of chattel slavery on pseudo-scientific and theological grounds took hold,[8] and more restrictive forms of racial control were erected by colonial authorities.[9] With the invention of the cotton gin in 1790, the plantation system fingered its way westward, and cotton became the South's main export staple. As Mark Smith observes, "the gin and the industrial revolution in New England and Britain, whose burgeoning textile manufactures consumed Southern short staple of cotton in a seemingly unquenchable rates, had unleashed the cotton boom which was to dominate the South's economy and plantation system up until the outbreak of the Civil War".[10] For example, between 1790 and 1800, South Carolina's annual cotton exports increased from less than ten thousand pounds to roughly six millions.[11]

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[4] Lowndes (et al, 2008: 3).
[5] Fredrickson (1971: 47-50).
[6] Morgan (1975).
[7] Smith (1998: 5).
[8] Stampp (1956: 8).
[9] Higginbotham (1978).
[10] Smith (1998: 6).
[11] Klarman (2007: 29).

The accelerated development of the Southern agrarian economy enhanced the demand for slave labour. From roughly 700,000 African-American slaves in 1790, the South became home to nearly 4 million black bondpeople by 1860.[12] By that year, ninety-five percent of the black population lived in the South, where it comprised one-third of the overall population, compared with only two percent of the population in the North.[13] The rapid growth of the black population and the increasing dependency of Southern economy on slave labour created pressing challenges of coordination for the newly established Southern states. The policy measures used by Southern governments for stabilizing the institution of slavery had to be devised within an increasingly complex political setting. Just as plantation slavery had become the engine of the region's economic growth, it was dissipating in the North where the climate conditions proved unsuitable to plantation labour and a growing recognition that the principles of the American Revolution were incompatible with human bondage was beginning to take hold. As I will argue, the proliferation of "pro-slave" criminal legislation from the early nineteenth century to the Civil War was responsive to these new challenges of coordination and legitimation.

The laws governing violence against African-American victims formed a part within the broader framework of slave law. Because English colonial policy rested on tacitly delegating lawmaking authority to local assemblies, this legal framework developed independently of direct English influence[14] (though it did borrow from the English legal tradition various principles and precedents related to the governance of lower-class people).[15] Slave Codes were first enacted in Maryland and Virginia during the 1660s,[16] and they quickly became the standard statutory source for governing slaves and race relations in both Northern and Southern colonies.[17] The Codes were supplemented by a body of jurisprudence that evolved through the application of common law doctrines and principles to the unique context of slavery.[18]

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[12] Fogel (1989: 65-67).
[13] McPherson (1996: 15)
[14] Bush (1993: 457-8).
[15] Nicolson (1994: 42).
[16] Stampp (1956: 22).
[17] Klarman (2007: 11-13).
[18] On the sources of slave law, see: Morris (1996: chapter 2). On the complex relationship between codification and judicial policy-making in the development of slave law, see Tushnet (1981: 72).

The policy taken by colonial and antebellum Southern law with respect to the institution of slavery was premised on devolving the regulatory authority over most aspects of slave conduct to masters. Southern law sanctioned the masters' prerogative to use corporeal force in order to compel slaves to perform their tasks.[19] The infliction of corporeal punishment was not the only method by which discipline, submissiveness and productivity were encouraged in everyday plantation life. As many historical studies illuminate, the paternalistic sentiments of slaveholders often made them reluctant to exert their disciplinary prerogative to its full.[20] As conceded by the prominent abolitionist George Stroud in his seminal *Sketch of the Laws relating to Slavery*, the treatment of individual slaves would typically "take its complexion from the peculiar disposition of their respective masters, - a consideration which operates as much against as in favor of the slave".[21] Yet the customary use of brutish disciplinary practices such as chaining and ironing, placing in stocks, whipping, branding, mutilating, shooting, and mauling with dogs, is also widely documented.[22] Besides the infliction of corporeal force, Southern law vested masters with nearly unlimited discretion to decide on virtually every aspect of their bondsmen's life (e.g. whether, and with whom, they could maintain a nuclear family or practice their ancestral traditions). Southern law would intervene only in instances of extreme deviations from conventional forms of treating slaves. Colonial legislatures, for example, were primarily concerned with dissuading benevolent masters from manumitting their slaves or ameliorating their conditions, out of fear that such concessions would induce slave rebellion and disorder.[23]

The primary doctrinal tool which served to rationalize the non-interventionist approach taken by Southern law with regard to plantation life was the classification of the slave as an article of property, "a chattel personal".[24] As Kenneth Stampp observed, this classification resonated with - and in turn reinforced - prevailing cultural norms which degraded the human value of slaves.

> "Men discussed the price of slaves with as much interest as the price of cotton or tobacco; slaves were bartered, deeded, devised, pledged, seized, and auctioned.

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[19] Genovese (1976: 32); Stampp (1956: 23); Kennedy (1998: 30).
[20] See, e.g. Genovese (1976: 33); Klarman (2007: 13); Kennedy (1998: 34).
[21] Quoted in Tushnet (1981: 11).
[22] Stampp (1956: 171-191).
[23] Klarman (2007: 11).
[24] Stroud (1827: 11).

> They were awarded as prizes in lotteries and raffles; they were wagered at gaming tables and horse races. They were, in short, property in fact as well as in law".[25]

However, the idea of "slave as property" had its roots in a long-standing tradition of rationalizing the denial of rights from particular categories of persons by means of repudiating their full belonging to the human race. This mode of rationalization harks back to Aristotle's categorization of slavery as a matter of household-governance (the art of managing "instruments of various sorts; some are living, others lifeless").[26] As Markus Dubber argued, this Aristotelian view continued to influence the way in which the Western legal tradition rationalized the deregulation of various sorts of patriarchal relationships throughout the Roman and Medieval periods (e.g., in matters concerning women and children). This creed was conveniently adopted by colonial American law to justify its eschewal from intervening in the humanitarian conditions of slaves within plantation.[27] The repressive character of this body of law was excoriated by abolitionists.[28] Harriet Beecher Stowe's famous observation in *The Key to Uncle Tom's Cabin* provides a classical example of the abolitionist critique:

> "The Slave code...of the Southern state is designed to keep millions of human beings...in a condition in which the master may sell them, dispose of their time, person, and labour; in which they can do nothing, possess nothing, and acquire nothing, except for the benefit of their master; in which they are doomed in themselves and in their posterity to live without knowledge, without the power to make anything their own, to toil that another may reap".[29]

The dominant view which held that a master could not be liable to indictment for battering or abusing his slave nested neatly into this legal framework. As late as 1829, the Supreme Court in North Carolina opined that, "inherent in the relation of a master and a slave" lay the notion "that the power of the master must be absolute to render the submission of the slave perfect".[30] However, by this time, as I will show in section C of this chapter,

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[25] Stampp (1956: 201).
[26] Aristotle (1905: IV).
[27] Dubber (2005: chapter 1).
[28] See, e.g. Stroud (1827).
[29] Stowe (1968: 132).
[30] State v. Mann, 13 N.C. 168 (1829).

this position was no longer uncontested. Southern legislatures and judges increasingly qualified this position and officially outlawed various forms of mistreating slaves in plantations. To a considerable extent, however, the persisting cultural and legal resonance of the "slave as property" concept continued to impede the enforcement of such laws.

Slave law covered not only relationship between masters and slaves within plantations, but also enforced compliance with white supremacist norms in the public sphere. Two structural features of the legal regulation of interracial relations outside plantations are of particular importance. First, the major goal of this body of law was to reinforce the inferior status of "the Negro race" (both slaves and freemen) in all aspects of social, political and economic life. For example, most Slave Codes (including those in the Northern colonies) had disenfranchised not only slaves but also free blacks. In addition, restrictions on free blacks' right to create contracts or accumulate property were common.[31] Slave Codes criminalized "impudence", an offence that, as testified by Frederick Douglas in his memoir of his experiences in thrall, could manifest itself "in the tone of an answer; in answering at all; in not answering; in the expression of countenance; in the motion of the head; in the gait, manner and bearing of the slave".[32] A second feature of the legal governance of racial relations in colonial and antebellum Southern society was its amalgamation of formal and vigilantist mechanisms for enforcing white supremacy. In addition to gendarmeries of slave patrols which enforced the stringent restrictions on blacks' free movement, any white male was entitled to apprehend any black person found off the plantation. In South Carolina, for instance, in case of refusal of a black person to submit himself to interrogation, the white questioner was legally authorized to summarily execute him.[33] Even for mere insolence, a member of the master race had the right to beat a slave or a free "Negro".[34] Such laws reflected the peculiar tradition of Southern vigilantism which (as we shall see in the next chapter) would continue to inflame white supremacist violence long after the formal abolition of slavery.

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[31] Klinkner & Smith (1999: 12).
[32] Quoted in Stampp (1956: 145).
[33] Belknap (1987:2).
[34] Ibid, ibid.

Even this brief introduction of the structural conceptual and institutional components of antebellum slave law can give a sense of the oddity of the emergence of criminal categories which were specifically aimed at protecting slaves within this socio-political setting. African-Americans, who were disenfranchised and formally barred from testifying in courts or initiating legal proceedings, lacked any meaningful access to the vehicles through which criminalization policies are being shaped and enforced. In addition to its relentless white supremacist culture, another feature of antebellum Southern society seemed to further preclude the emergence of such categories. Antebellum Southern culture prioritized the ideal of popular justice vis-à-vis the notion of the rule of law, and normalized the use of extralegal violence (either in its aristocratic form of dueling, or in its popular form of lynching) as a preferable means for settling disputes.[35] In particular, antebellum Southerners strongly believed that it was both justified and necessary to use physical force in order to dissuade slaves from rebelling against their masters.[36] What, then, led antebellum Southerners to embark upon the establishment of a criminalization regime which was specifically aimed at penalizing the victimization of slaves?[37] Before moving to address this puzzle, the next section will survey the evolution and main features of "pro-slave" criminal laws.

C. The Protection of Slaves in Antebellum Criminal Law: From "Chattel Personal" to Human Beings

The question of whether slave law should impose any limits on the forms and measure of force that can be used against slaves was raised in two main legal contexts: laws governing the homicide of slaves, and laws governing their (nonfatal) "cruel and inhumane" treatment. The scope of criminal liability for the homicide of slaves was first addressed in colonial Virginia.[38] A statute enacted in 1669 provided that the killing of a slave would not be considered as a felony if death resulted from violence administered for the purpose of

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[35] Ayers (1984).
[36] Davis (2006: 196).
[37] This question corresponds with the problem posed by Marx in his analysis of the emergence of Factory Act, viz., what led a Parliament which was elected entirely by the upper and middle classes to enact legislation which was aimed at ameliorating the conditions of labour? Methodologically, much of the discussion which follows is indebted to Marx's mode of addressing this question. See Marx (1992)[1857].
[38] Morris (1996: 163).

subduing resistance or imposing discipline.[39] Echoing Aristotle's view that "there can be no injustice...towards things that are one's own",[40] prominent commentaries on colonial slave law rationalized this legislative approach by expounding that "it cannot be presumed that prepensed malice (which alone makes a murder felony) should induce any man to destroy his own estate".[41] In 1705, the justification of the killing of a slave "by reason of any stroke or blow given during his or her correction" had been extended to cover not only masters, but also white strangers.[42] Even in the absence of any justificatory, excusing or mitigating grounds, the malicious killing of a slave was subjected to considerably milder penalties. For example, in South Carolina, slaying a slave was penalized by a £700 fine compared with capital punishment for killing a white person.[43]

Alongside the removal of common law protections from slave victims, colonial slave law established civil remedies for compensating masters for their monetary loss (in cases of the killing of slaves by white strangers, hirers or overseers). The prevailing mechanism - established in South Carolina (1712), Georgia (1755) and North Carolina (1774) - enabled masters to bring civil actions seeking reimbursement for the full pecuniary losses suffered for the value of their chattel personal.[44] As I will argue below (section D1), the transition from tort remedies to criminal enforcement throughout the antebellum period was driven by new incentives to deter and to condemn such conduct. These incentives were associated with the climbing prices of slaves and the escalation of the political controversy over the legitimacy of slavery.

The legal and moral arguments which justified the decriminalization of violence against slaves were not entirely dissolved during the antebellum period. They continued to impede the equal protection of slaves long after statutory reforms had ascribed criminal liability for such conduct. Nevertheless, from the last quarter of the eighteenth century, a paradigm shift with respect to the legal protection of slaves in Southern criminal law had crystallized. This shift found its paradigmatic expression in 1791, when a 1774 statute which subjected the "willful and malicious" homicide of a slave to only

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[39] Quoted in Morris (1996: 164).
[40] Aristotle (1956: book v, vi).
[41] Morris (1996: 164).
[42] Ibid, ibid.
[43] Hindus (1976: 577).
[44] Fede (1985: 110).

one year of imprisonment was repealed by the North Carolina's legislature. Redefining such an act as a murder, the legislature criticized the pre-existing law as "disgraceful to humanity and degrading in the highest degree to the laws and principles of a free, Christian and enlightened country" because it drew a "distinction of criminality between the murder of a white person and of one who is equally a human creature, but merely of a different complexion".[45] During this period, four slave states included provisions which equalized punishment for the killing of a slave and the killing of a free person in their constitutions,[46] and many other states amended their law of homicide to the same effect.[47] By 1821, all slave states had passed some sort of legislation criminalizing the killing of slaves.[48] These developments led Justice John B. O'Neal of the South Carolina Supreme Court to observe that the 1821 statute which made the killing of a slave capital offence "elevated slaves from chattels personal to human beings".[49]

The development of legal responses to nonfatal abuse of slaves had also accelerated from the late eighteenth century onwards.[50] In some states, "pro-slave" legislation banned specific "corrective" measures. A South Carolina statute, for example, provided for a fine of up to £100 if a person "cut out the tongue, put out the eye, castrated, or cruelly scald, burn, or deprive any slave of any limb and member". The statute also prohibited "any cruel punishment other than" the following (which thereby became legally sanctioned): "whipping or beating with a horsewhip, cowskin, switch or small stick, putting on irons, or confining or imprisoning the slave".[51] As the nineteenth century progressed, such legislation came to cover many more aspects of plantation life. For example, a statute enacted by Georgia in 1852 required masters to provide slaves with adequate food and clothing, and went on to prohibit "requiring greater labor from such slave or slaves, than he, she or they are able to perform". [52]

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[45] Quoted in Friedman (1993: 90-91).
[46] These are: Georgia (1798); Alabama (1819); Missouri (1820), and Texas (1845). See Morris (1996: 172).
[47] Including Tennessee (1799) & Virginia (1788). See Morris (1996: 172-173).
[48] Genovese (1976:37).
[49] State v. Manner, 2 Hill 453 at 455 (1834) (9 S.C. 249).
[50] Rose (1982: 23).
[51] Quoted in Morris (1996: 183).
[52] Similar legislation was enacted by Alabama (1852), Kentucky (1852) and Louisiana (1856). See Morris (1996: 195-6).

In most states, however, "pro-slave" legislation did not specify the prohibited forms of mistreating slaves. Instead, the dominant legislative technique had outlawed "cruel and inhumane" treatment of slaves and entrusted jurors and judges with the task of defining the meaning of this open-ended term on a case-to-case basis.[53] The rationale of this legislative strategy was encapsulated by the North Carolina Supreme Court:

> "Every individual in the community feels and understand that the homicides of a slave may be extenuated by acts, which would not produce a legal provocation if done by a white person. To define and limit these acts would be impossible, but the sense and feeling of Jurors, and the greave discretion of courts, can never be at loss in estimating their force when they arise and applying them to each particular case". [54]

It has often been observed that, in a cultural setting which dehumanized virtually every aspect of blacks' social identity,[55] the reliance on popular judgments for measuring the degree of "cruel and inhumane" treatment was doomed to fail as a strategy for protecting slaves and bringing their perpetrators to justice. As Kenneth Stampp pointed out, "most white men were obsessed with the terrible urgency of racial solidarity, with the fear that the whole complex mechanism of control would break down if the master's discretion in governing slaves were questioned".[56] Indeed, white supremacist norms were so deep seated in Southern culture that the boundary between "deviant" and "normal" forms of degrading slaves could hardly be sustained. However, by focusing on the declared aims which such legislation was expected to perform, these interpretations might have failed to decipher the full range of political functions which "pro-slave" criminal legislation actually played. As I will show in the remainder of this chapter, although its suitability to advance its declared preventive and retributive aims was indeed deficient, "pro-slave" criminal legislation fulfilled salient ideological functions which were perceived as desirable by Southern economic and political elites. Essentially, I will argue, the ambiguity inherent within this legislation was suitable for facilitating ad-hoc compromises between the competing hegemonic interests which were at stake.

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[53] E.g. Alabama's 1852 Code.
[54] *State v. Tuckett*, 8 N.C. (1 Hawks.) 210, 217 (1820).
[55] Paterson (1982).
[56] Stampp (1956: 222).

D. The Driving Forces of the Emergence of "Pro-Slave" Criminalization

We now turn to a discussion of the historical conditions which enabled the emergence of "pro-slave" criminal legislation in antebellum Southern society. The explanatory framework which informs the analysis is twofold. I begin by identifying the major challenges of coordination and legitimation with which Southern political and economic elites were faced from 1790s onwards (the historical moment in which such legislation had started to gain political momentum). I then move to consider how the enactment of such criminal categories could have contributed to the efforts of Southern authorities to tackle these challenges. This inquiry will focus on two sites of conflict which generated the most acute challenges to the legitimacy and stability of the slavery system. First: the crisis tendencies which emanated from the class structure of antebellum Southern society; second, the conflict between the South and the North over the constitutional and moral legitimacy of the institution of slavery.

D1. "Pro-Slave" Criminalization and the Mediation of Class Conflicts

As noted earlier, slave labour served as the engine of the Southern agrarian economy. By the late eighteenth century, the region's massive production power of cotton made the Southern economy a key contributor to the American export market.[57] The political economy of Southern society was profoundly shaped by the need to coordinate and legitimate the fierce wealth disparities which evolved around the institution of slavery. When analyzing Southern slave society, it is important to note that 75% of the free families in the region owned no slaves at all.[58] The majority of slaves were held by a small number of families who owned the large plantations in which cotton, tobacco, sugar and rice were cultivated on a massive, commercial scale. In turn, the economic power of the planter elite enabled it to accumulate enormous political influence. As William Julius Wilson has argued:

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[57] Smith (1998: 60-71).

[58] Stampp (1956: 30). According to the 1860 Census, slaveholders comprised 385,000 out of 1,516,000 free families in slave-holding states. However, almost 50% of slaveholders possessed no more than five bondsmen. It is estimated that the planter elite (i.e. owners of more than twenty slaves) was comprised on no more than 10,000 families. See: Wilson (1980: 24-25).

> "Tradition, property qualifications for the suffrage, the counting of the slave population for purposes of legislative appointments, the gerrymandering of legislative districts to the detriment of poor whites, or, as in South Carolina, qualification which barred office to all but slaveholders... made it easy for the master class to control the state and block all unfavorable legislation".[59]

At the same time, the centrality of cotton production to the region's economy gave rise to relentless popular resistance to the abolition of slavery. Abolition was portrayed as an imminent threat to the region's prospects of economic survival and indeed to its very cultural identity. Popular resistance to the restructuring of Southern economy remained firm notwithstanding the starkly unequal distribution of the fruits of slave labour among social classes and across the South's sub-regions.[60]

It would be simplistic to treat *class* as the over-determining catalyst of the formation of white supremacist culture in colonial and antebellum Southern society. For instance, historians who focus on the cultural dimensions of the system of slavery have argued that the origins of white supremacist Southern culture predated the emergence of the plantation system.[61] It has also been demonstrated that the evolution of these cultural forms was sometimes at odds with the needs of the plantation economy.[62] Taking on board the importance of seeking to integrate (as much as possible) the study of the cultural, economic and political forces which shaped the formation of American slavery, it is clear that the class structure which evolved around the institution of slavery played a salient role in shaping the specific political and social functions played by white supremacist ideologies. The notion of "whiteness" as a collective identity shared by English, Dutch, Scots and German settlers in the New World had developed gradually throughout the colonial era via the encounters of these settlers with Native Americans and with imported black slaves.[63] As slavery and blackness became increasingly intertwined, the allocation of political and symbolic privileges to whites *qua* members of

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[59] Wilson (1980: 26).
[60] For example, in South Carolina and Mississippi, approximately half of the families owned slaves, while in Maryland and Missouri, one-eighth, and in Delaware, one-thirteenth. See: Stampp (1956: 30).
[61] Jordan (1968).
[62] On the debate between class and culture in the historiography of slavery, see: Gross (2001).
[63] Allen (1997).

the ruling caste served to mobilize popular support of the institution of slavery. Among other things, the construction of the idea of "race" (as an essentialist and hierarchical binary opposition between "whites" and "Negros")[64] served to forge a sense of solidarity between the planter elite, yeomanry and poor whites, although the latter two groups clearly lacked material interest in the preservation of slavery. In particular, the economic bargaining power of the mass of white workers was highly constrained as long as plantation owners were able to hire slaves and keep them at subsistence levels.[65]

In a society that normalized the use of extralegal violence in response to perceived violations of informal codes of honour,[66] white supremacist sentiments often found expression in the infliction of violence on members of the inferior racial caste. As Kenneth Stampp notes, such violence had served as an expressive medium through which poor whites had asserted their privileged status (in a political setting which de facto deprived them of access to economic or political power). "Even in poverty", he points out, "they enjoyed the prestige of membership in the superior caste and proudly shared with slaveholders the burden of keeping black men in their place".[67] Slaveholders faced a dilemma while considering how to respond to such violence. On the one hand, they were impelled to turn a blind eye to such incidents in order to retain the façade of solidarity with lower class whites. At the same time, such violence compromised two sets of interests. First, it impinged on the monetary interests of individual slaveholders (and a fortiori of slavery as an economic system) in keeping the value of their chattel personal intact. Second, in defying slaveholders' prerogative to discipline their slaves as they see fit, violence by non-slaveholders posed a challenge to the structure of patriarchal authority upon which slave-masters relations rested.[68]

It is in this context that we can understand why, from the late eighteenth century onwards, criminalization came to replace civil remedies as the primary legal instrument through which the problem of slave victimization had been tackled. The transition from civil remedies to criminalization seems to be driven by two historical processes which

[64] Cf. Anderson (1983).
[65] Stampp (1956: 426); Wilson (1980: 42-44).
[66] Ayers (1984).
[67] Stampp (1956: 426).
[68] Genovese (1976: 33).

increased the tendency of slaveholders to have recourse to criminalization in this particular epoch. The first process entailed the climbing monetary value of slaves from 1800 onwards.[69] The outlawing of the foreign slave trade by the federal government in 1808,[70] and the boosting of demand for slave labour in the newly settled territories of the Southwest[71] provided two momentous driving forces for the soaring prices of slaves during this period. As one Southerner observed in 1849, "the time has been that the farmer could kill up and wear out one Negro to buy another; but it is not now so. Negros are too high in proportion to the price of cotton, and it behoves those who own them to make them last as long as possible".[72] With the climbing economic value of slaves both to individual masters and to the Southern agrarian economy as a whole, the pre-existing civil law mechanisms of monetary compensation became ineffective in deterring poor white perpetrators, who increasingly became incapable of paying the full value of a dead or seriously injured slave.[73]

In addition, wanton assaults on slaves by overseers and white strangers posed a challenge to the patriarchal prerogative of masters to discipline their slaves' conduct. Given the pervasive degree to which coercion and racial degradation were built into the modus operandi of the slavery system, the moral censure expressed by slaveholders in the face of such incidents can be justifiably criticized as illustrating their double standards. But such censure mirrored deep-seated cultural norms which were common among slaveholders. Adhering to status-based codes of honour which served to distinguish Southern gentlemen from lower class whites, support for criminalization also served Southern elites to reinforce their hegemonic cultural codes. This legislation drew a normative distinction between the forms of racial domination which could be deemed civilized (and, from masters' point of view, as having educative purpose) and forms of purely abusive racial degradation.[74]

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[69] Phillips (1968: 126).
[70] Fede (1985: 107-108).
[71] Wilson (1980: 32).
[72] Brogan (1999: 282).
[73] Fede (1985: 113).
[74] Ayers (1984: 16).

The way in which the confluence of these economic, political and cultural concerns shaped the character of "pro-slave" criminalization was encapsulated by North Carolina's Supreme Court:

> "These offenses are usually committed by men of dissolute habits, hanging loose upon society, who, being repelled from association with well disposed citizens, take refuge in the company of colored persons and slaves, whom they deprave by their example, embolden by their familiarity, and then bear, under the expectation that a slave dare not resent a blow from a white man. If such offenses may be committed with impunity...the value of slave property must be impaired, for the offenders can seldom make any reparation of damages".[75]

However, while these economic, political, and cultural forces provided incentives to criminalize particular forms of slave abuse, the degree to which such legislation could have been enforced was constrained by other features of antebellum Southern society. First, given the pervasiveness of white supremacist norms in Southern culture, public opinion was unreceptive to the idea of equalizing criminal liability for injuring slaves and white citizens. As Eugene Genovese puts it, "public opinion...did not readily suffer known sadists and killers, but neither did it suffer blacks to testify against whites, and therein lay the fatal weakness of the law".[76] Secondly, slaveholders were all too aware that the institutionalization of effective mechanisms of enforcement would eventually encroach upon their authority to rely on corporeal violence in plantations.

For the planter elite, then, the optimal strategy was to mobilize the enactment of such legislation (in order to utilize its symbolic and persuasive effects) while impeding the development of effective enforcement mechanisms which could have interfered with the "normalized" use of violence in plantations.[77] The typical form of "pro-slave" offences was suitable for fulfilling this task. Such laws conveyed that "cruel and inhumane" treatment of slaves might be subjected to penalization. Yet, in an era in which the composition of juries and of the judiciary reflected the social prerogatives of upper class

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[75] State v. Hale, 9 N.C. 325-27 (1823).
[76] Genovese (1976: 38).
[77] Cf. Fitzpatrick (1987).

white males,[78] it was unsurprising that the legal interpretation of the term "cruel and inhumane treatment of slaves" was consistent with masters' normative worldview. This structure of "pro-slave" offences retained the level of flexibility which was required in order to mediate between the competing hegemonic interests that were affected by these violent incidents. Thus, as I will argue in section E of this chapter, the limitations of "pro-slave" criminalization in meeting its preventive and retributive goals were profoundly interwoven with its functional role in stabilizing the antebellum systems of racial and class stratification.

D2. "Pro-Slave" Criminalization and the Mediation of Regional Conflicts over the Legitimacy of Slavery

A second driving force which accelerated the development of "pro-slave" criminalization throughout the antebellum period was the intensification of the regional controversy over the moral and constitutional legitimacy of the institution of slavery. The proliferation of antislavery mobilization during this period created new pressures on Southern authorities to reconcile the "peculiar institution" with the system of ideas which began to define the American political ethos. As I will argue, expanding the body of criminal legislation which penalized abusive treatment of slaves emerged as was one of the strategic responses taken by Southern elites and authorities as a means of tackling these challenges. At the same time, the consolidation of pro-slavery sentiments in Southern society in response to the rise of the Abolitionist movement created conditions which inhibited both the enforceability of these new criminal rules and their ability to serve as a vehicle of structural social reforms.

Regional disparities in race-related legal policies and social practices were already noticeable in the colonial era. Although African-Americans (slaves as well as freemen) were subjected to various forms of political and civic disempowerment in Northern colonies, Northern Slave Codes were typically much more lenient than Southern counterparts.[79] They often remained silent on issues which were plainly prohibited by Southern legislatures (e.g. literacy) and in some colonies allowed slaves to acquire

[78] Hindus (1976: 577).
[79] Klarman (2007: 14).

property and to purchase their freedom.[80] Most importantly with respect to our subject matter, Northern slave law did not formally discriminate between white and black victims of crime, and subjected offenders who killed or maimed slaves to similar penalties to those to which victimizers of white persons were liable.[81] The contrast between the two regional systems of slave law reflected broader demographic and economic disparities pertaining to the size of the slave population and its role in each region's economy. The slave population in the North was considerably smaller, and it did not concentrate in labour-intensive sectors such as agricultural plantations.

However, it was not until the second half of the eighteenth century that antislavery sentiments started to gain ground in Northern political consciousness. Antislavery campaigns began to trigger policy reforms in the Revolutionary era.[82] These reforms were stimulated by the effort to reconcile the "self-evident truth" that "all men were created equal, that they are endowed ... with certain unalienable rights, among these are life, liberty and the pursuit of happiness" (which was championed as the keystone of the nation's political ethos) with the manner in which slaves and free blacks were treated. The Northern endorsement of abolitionism was hardly unambiguous. In fact, Northern elites had often rationalized the compatibility of this "self-evident truth" with the preservation of slavery on the ground that since blacks did not fully belong to the human race (and allegedly lacked some of the capacities which were necessary for the exercise of rational judgment and free will), they did not possess natural rights.[83]

Nevertheless, antislavery sentiments eventually triumphed in Northern public opinion. In 1780, Pennsylvania adopted the nation's first gradual emancipation scheme, declaring that slavery was "disgraceful to any people, and more especially to those who have been contending in the great cause of liberty themselves".[84] By 1804, all Northern states had abolished slavery within their territories. When the nineteenth century dawned, Eric Foner notes, "Northerners came to view slavery as the very antithesis of the good

[80] Ibid, 13-15.
[81] Ibid, 14.
[82] Davis, David B. (1999).
[83] Fridrickson (1971: chapter 2).
[84] Klarman (2007: 16).

society, as well as a threat to their own fundamental values and interests".[85] The rise of capitalism and of "free wage labour" ideology led many Northerners to claim that, in addition to its immorality, the slavery system was stagnant and inefficient. The reliance on slave labour, they stressed, precluded Southern economy from adjusting the size of the workforce in accordance with fluctuations in demand, and thus retarded the nation's economic growth.[86] Following the abolition of slavery throughout the North, and the coming into effect of the federal ban on international slave trade in 1808, Northern antislavery campaigners had increasingly focused on pressurizing Southern states to eliminate "the peculiar institution". The founding in 1833 of the American Antislavery Society, and, more importantly, the establishment in 1854 of the Republican Party, created vehicles of grassroots and political mobilization through which antislavery activists were able to gain much greater influence on policymaking at the national level.[87]

With the proliferation of the Abolitionist movement, the coercive techniques which had been traditionally used to discipline slaves in Southern plantations became susceptible to unprecedented public scrutiny and criticism. The publication in 1839 of Theodore Dwight Weld's influential *American Slavery As It Is: Testimony of a Thousand Witnesses*,[88] which compiled a massive bulk of evidence from Southern newspapers and public records for illustrating the savage character of disciplinary measures employed in plantations, demonstrated the power of such narratives to galvanize Northern revulsion against Southern slavery.[89] As Mark Tushnet notes, by the mid 1830s, Southern legislators and judges became increasingly cautious of the possibility that statutes and judicial opinions "would be scrutinized by abolitionists eager to find evidence of slavery's inhumanity, and a number of opinions seem aware of that audience".[90]

As the proliferation of antislavery campaigns created new pressures of legitimation for Southern authorities and elites, they became increasingly inclined to use the expressive qualities of criminal law in order to represent such brutal conducts as rare

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[85] Foner (1970: 9).
[86] Smith (1998: 9-10).
[87] Foner (1970).
[88] Weld (2009)[1839].
[89] Stampp (1956: 180).
[90] Tushnet (1981: 19).

exceptions to the normal way in which slaves were treated in plantations. The expansion of "pro-slave" criminal legislation communicated one of the central messages emphasized in proslavery apologetics. Inordinate cruelty, Southerners argued, was out of line with their codes of honour, and much less common that contended by Abolitionists.[91] Moreover, proslavery advocates often stressed the contrast between, on the one hand, the protective sentiments which the masters' paternalist mentality encouraged, and, on the other hand, the tendency to treat wage workers as pure commodity in the "free" labour market of nineteenth century capitalism.[92] They also insisted that the Northern and European proletariat fared far worse than Southern bondsmen.[93] Whatever the merits of this argument (and it seems that, in terms of material conditions alone, it was not entirely flawed), it exemplifies the striking resemblance between, on the one hand, the conditions which impelled antebellum Southerners to establish a criminalization regime for regulating the most grossly inhumane and politically problematic manifestations of the slavery system, and, on the other hand, the conditions which, according to Marx's seminal analysis of the *Factory Act*,[94] motivated the simultaneous emergence of legal regimes for the regulation of labour conditions in Europe. This resemblance, I would argue, touches upon a profound aspect of such benevolent legislative reforms which emerge within entrenched system of inequality. As theorized by Marx, this aspect pertains to the suitability of such legislation to stabilize wide-ranging systems of inequality by means of invalidating their most egregious and inhumane symptoms and thus reinforcing public belief in the basic commitment of the legal system to principles of fairness, rationality, and justice.

The increasing recourse to criminalization to symbolize Southern commitment to protect slaves from cruel and inhumane violence was embedded within a broader strategy to which antebellum Southerners resorted in the face of antislavery campaigns. The popular belief in blacks' mental inferiority led most Southerners to regard proposals for their naturalization or enfranchisement as preposterous. However, the path of ameliorating the conditions of servitude was advocated by pragmatic Southerners as the

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[91] Stanpp (1956: 180-181).
[92] Genovese (1976: 661-662); Smith (1998: 10).
[93] Klarman (2007: 30).
[94] Marx (1992)[1857].

most advisable strategic path for containing the fundamental political challenge posed by antislavery campaigners. From the early 1830s onwards, supporters of amelioration initiated a range of reforms which led slave law to recognize (and to profess to protect) the humanity of slaves in various legislative and doctrinal contexts.[95]

As Mark Tushnet has argued, had supporters of amelioration won the day, the development of Southern law might have assimilated the development of modern law in bourgeoisie society (which, from a Marxist perspective, evolved through piecemeal strategic adaptations aimed at containing the oppositional forces within the system of capitalism).[96] Within such a project of gradual containment, the further expansion of "pro-slave" criminal legislation was highly probable. Such expansion could have provided Southern authorities with a suitable instrument for individualizing blame for the appalling racial practices spotlighted in Abolitionist campaigns. Indeed, the sociological literature is littered with examples of how the institutionalization of legal mechanisms for outlawing particular "excesses" of fundamentally unjust political regimes might reinforce their legitimacy, and indeed entrench the very same inhumane conditions which these progressive reforms purport to eliminate.[97] However, this movement towards rationalizing slave law was cut short by the political circumstances which led to the escalation of the interregional controversy over slavery. The election of Abraham Lincoln to the presidency in 1860 convinced many Southerners that secession from the Union was the only way to preserve slavery and to inhibit what they perceived as an imminent threat to their very way of life. The Southern decision to wage war in order to break free from Northern pressures (rather than to accommodate them through limited concessions and piecemeal reforms) halted the development of this early experiment with using "pro-minority" criminalization as a means of legitimating American race relations.

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[95] Tushnet (1981).
[96] Tushnet (1981: 231-232).
[97] Shamir (1990); Steiker and Steiker (1995).

E. The Preventive, Political and Cultural Effects of "Pro-Slave" Criminalization

In the introductory chapter of this study, I proposed that the performances of "pro-minority" criminalization policies should be assessed against three yardsticks. First, their success in minimizing violence against minority groups (*the preventive rationale*); second, their ability to serve as a vehicle of political empowerment and to facilitate the extension of civil rights in other policy domains (*the political rationale*); and third, their accomplishments in delegitimizing degrading and discriminatory social norms (*the educational rationale*). In this section, I will assess the accomplishment of "pro-slave" criminalization in meeting these three aims. I will then discuss some of the broad sociological lessons that can be drawn from this analysis with respect to the general limitations of "pro-minority" criminalization reforms in delivering these aims.

E1. "Pro-slave" Criminalization and the Preventive Rationale of "Pro-Minority" Criminalization:

The accomplishments of "pro-slave" criminalization in preventing violence cannot be empirically proven. The inadequacy of the mechanisms used in colonial and antebellum eras for recording and measuring crime rates as well as patterns of prosecution and conviction render such evaluations irretrievably speculative. Written trial records became mandatory in Southern appellate courts only in 1833, and no systematic mechanisms existed for documenting the performances of lower courts or of other agencies of the antebellum Southern criminal justice system.[98] The records of Southern appellate courts attest that, between 1833 and 1860, fifty five convictions for killing or abusing slaves were appealed. Most of these convictions were upheld.[99] This evidence implies that the statutes prohibiting the killing or abusing of slaves were not completely unenforceable. Still, given the lack of reliable evidence regarding the bulk of incidents which were never reported, investigated, prosecuted, yielded convictions or appealed, these figures cannot establish a reliable benchmark of the actual level of enforcement of these statutes.

In the absence of a sufficient body of empirical evidence on enforcement patterns, we can nevertheless use our socio-legal knowledge regarding the conditions upon which efficient

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[98] Hindus (1967: 577).
[99] Nash (1970: 214).

enforcement of criminal legislation depend in order to analyze the suitability of this criminalization regime to restrain the measure of violence to which slaves were subjected. As we noted in the first chapter, the effective enforcement of criminal legislation depends on the satisfaction of particular institutional and cultural conditions.[100] These conditions affect the tendency of legal actors and lay citizens to classify a potentially-criminalized conduct as a "crime" and to recourse to crime enforcement measures. To what extent could these preconditions have been satisfied in antebellum Southern society?

The exclusion of blacks from participating in the criminal process created a range of institutional impediments to the effective enforcement of "pro-slave" laws. African-Americans (regardless of their status as slaves or freemen) were barred from giving sworn testimony against whites in all Southern states (as well as in federal courts) and could not initiate prosecutions.[101] As one Southerner observed, there were "thousands of incidents of plantation life concealed from public eye, witnessed only by slaves, which the law could not reach".[102] Blacks were also categorically barred from jury service (which, in the antebellum South, was limited to white male freeholders).[103] The effect of these formal exclusionary mechanisms was exacerbated by the pervasiveness of informal cultural barriers which had dissuaded whites from testifying against a member of their own race in cases of violence against a "Negro".[104] Even in those rare cases in which such testimony was to be provided, the likelihood of conviction was sparse. The systems of values and beliefs which shaped the manner in which white jurors and judges interpreted the facts and applied the law were undoubtedly shaped by the relentless ideology of white supremacy which permeated antebellum Southern culture.[105]

Importantly, these cultural impediments to the enforceability of "pro-slave" criminal legislation were not alleviated even when the political circumstances which crystallized in the post-Revolutionary era impelled political and economic elites to enact such legislation. At the

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[100] See discussion in chapter 1 of this dissertation, Section C1 (PP. 25-30).
[101] Kennedy (1998: 39).
[102] Quoted in Stampp (1956: 222).
[103] Hindus (1976: 577). The status of blacks in the Northern criminal justice system was not dramatically better. Prior to the Civil War, only one state, Massachusetts, permitted blacks to serve on juries (Kennedy, 1998: 169).
[104] Stampp (1956: 222-223).
[105] On the centrality of such interpretive practices to processes of criminalization see Lacey (1995).

very same time in which the proliferation of the Abolitionist movement created new challenges of legitimation which were conducive to the development of such legislation, it transformed Southern culture in ways which inhibited the development of adequate enforcement mechanisms. Rather than prodding Southern society to reckon with the humanitarian breaches of slavery and to move toward its elimination, the proliferation of Abolitionism cemented Southerners' support of the "peculiar institution".[106] Southern public opinion scorned calls for abolition as a constitutionally illegitimate intervention in their political and cultural autonomy. The increasing defensiveness of Southern public opinion was manifested in new criminal statutes which made "advocacy of abolitionism" a criminal offence.[107] Within this cultural climate, the debate over the permissible forms of treating slaves within plantation became a salient site of interregional conflict. Just as, for Abolitionists, images of plantation whippings epitomized the iniquity of slavery, so, for Southerners, these "disciplinary measures" symbolized their ability to maintain the social order and to preserve "Southern" (white supremacist) cultural identity. The widespread support among white Southerners of the justifiability and necessity of the forceful control of the "Negro race" reflected their anxieties about the loss of economic and political privileges as well as fears of physical insecurity. Insofar as the interpretive practices through which Southerners had identified and responded to "slave abuse" reflected these public anxieties, the enforceability of the new legislative protections of slaves remained highly limited.

E2. "Pro-Slave" Criminalization and the Political Empowerment Rationale

As our analysis has shown, the post-1790s proliferation of "pro-slave" criminal legislation was responsive to new pressures of coordination and legitimation which Southern political authorities and economic elites confronted. In particular, these new pressures of coordination were driven by the soaring monetary value of slaves both to individual masters and to the Southern economy at large since the early nineteenth century. In this context, I argued, criminalization had replaced the mechanisms of tort remedies (which were used hitherto to compensate slave-owners for their monetary loss) in order to achieve a greater deterrent effect and to reinforce the structure of patriarchal authority which privileged the prerogative of slave-owners to discipline and punish

[106] Davis (2003: chapter 3).
[107] Friedman (1993: 93).

their slaves. The most salient challenges of legitimation which stimulated the expansion of "pro-slave" criminal legislation were generated by the proliferation of antislavery campaigning (through the organizational platform of the Abolitionist movement). In this context, I argued, "pro-slave" criminal legislation was aimed at communicating to the Northern public opinion that respect to slaves' human dignity could be incorporated into slave law and thus reconciling the institution of slavery with America's emerging political ethos.

To the extent that "pro-slave" criminalization policy had succeeded in furthering these intended goals, it had worked to stabilize the system of racial stratification which prevailed in antebellum Southern society. This observation challenges the conventional liberal reading which regards the extension of "pro-minority" criminal legislation as a barometer (as well as a catalyst) of a progress toward greater social equality.[108] In the case of "pro-slave" criminalization, it is clear that the expansion of such legislation throughout the final antebellum decades was not only insulated from a broader program of political inclusion and empowerment. Rather, this legislation was incorporated within the broader array of policies adopted by Southern authorities in order to contain demands for egalitarian racial reform in ways which would have been consistent with the preservation of slavery. Interestingly, concurrently with the wave of "pro-slave" criminal legislation, Southern states had adopted harsher measures for reinforcing white supremacy and for buttressing the institution of slavery. As Philip Klinkner and Rogers Smith point out, "after 1800, most Southern states placed new restrictions on private manumission, either banning them outright or making former owners liable for the support and good behavior of their freed slaves".[109]

The simultaneous move toward tightening of legal restrictions both on "slave abuse" and on manumissions suggests that the willingness of Southern policymakers to recognize the wrongfulness of particular forms of mistreating slaves was profoundly interwoven with their refusal to recognize the fundamental unfairness of the system of slavery within which such harms were fully embedded. However, what appears as a prima facie contradiction between these two conflicting modes of responding to the Abolitionist challenge might actually reflect an important undercurrent which is inherent in "pro-minority" criminalization reforms. The

[108] For example, Lawrence (1999).
[109] Klinker & Smith (1997: 27).

curious case of the emergence of "pro-slave" criminalization policy in the antebellum South illustrates the way in which such reforms can gain considerable political support even within political settings which preclude the development of structural egalitarian racial reforms.

As we will see in later chapters of this dissertation, the unfolding of these policies is driven by the interplay between social movements and governments while negotiating the political meanings of black victimization. The rise of new egalitarian movements tends to elevate public concerns about the laxity with which instances of racist violence are being tackled by the criminal justice system. These concerns are triggered by the strategic efforts of these movements to use evidence of the victimization of African-Americans in order to illustrate the dire consequences of their social marginalization and to demonstrate the urgency of structural racial reform. To be sure, we should steer clear of regarding the enactment of such reforms as a readily available solution to legitimacy deficits. The enactment of such legislation had certainly necessitated to challenge popular conceptions which resisted the idea of equalizing blacks' entitlement to legal protection and thus entailed political costs. Nevertheless, for pragmatic supporters of "the peculiar institution", such legislation signaled a reasonable compromise between the conflicting political forces upon which the stability of the institution of slavery depended: on the one hand, the containment of Northern pressures to abolish slavery altogether, and, on the other hand, the maintenance of popular resistance to the possibility of emancipating blacks.

The suitability of "pro-minority" criminalization reforms to fulfill this ideological task derives from the way in which it reconstructs the political meanings of the overexposure of minority groups to victimization.[110] By criminalizing particular forms of harming marginalized minorities, the State is being represented as responsive to social problems that are generated by individual bigots, rather than as complicit in creating the structural conditions within which such harms are likely to occur (and in which numerous other forms of economic exploitation and violence continue to be sanctioned by law on a mass scale). While the enactment of such legislation provides a form of symbolic recognition of the State's responsibility to protect minority groups, it frames this inclusionary message in a highly narrow manner. The normative responsibility of the State is presented as revolving around making offenders liable to harsher penalties, rather than as requiring the elimination of the criminogenic conditions (both

[110] On the correlation between vulnerability to victimization and other patterns of social deprivation see Sampson & Wilson (1995).

economic and cultural) which make marginalized groups disproportionally vulnerable to such violence. The pervasiveness of racial repression in the antebellum South makes it clear that the only sustainable solution to the problem of slaves' vulnerability to abuse was to abolish the institution of slavery (and thus the full range of mechanisms of economic dependency, political and legal disempowerment, and cultural degradation which made African-Americans disproportionately vulnerable to violence). To the extent that the legitimating effect of "pro-slave" criminalization reform had worked to impede the development of Abolitionism, it had served to perpetuate the very same forms of violence which it officially outlawed.

E3. "Pro-Slave" Criminalization and the Educative Rationale

That said, it is important to acknowledge that the legitimizing aspects of "pro-minority" criminalization reforms did not entirely preclude their transformative significance. Even if such legislation was primarily motivated by the effort to stabilize the institution of slavery, it nevertheless affirmed a valuable moral principle that, by that time, was still vehemently denied in most other areas of Southern law. Although the recognition of slaves' principled entitlement to equal legal protection remained largely under-enforced, this recognition nevertheless might have minimized the vulnerability of some African-Americans to violence by means of reinforcing the protective element of slaveholders' paternalistic culture.[111] This observation regarding the coexistence of a stabilizing effect at the macro level of race relations and a transformative effect at the micro level of the lived experiences of individual slaves draws on the argument made by E.P. Thompson in his seminal analysis of the impacts of the Black Act on eighteenth-century English society.[112] Acknowledging that "even rulers find a need to legitimize their power; to moralize their functions, to feel themselves to be useful and just", Thompson insisted that "not only were the rulers... inhibited by their own force...but they also believed enough in those rules, and in their accompanying ideological rhetoric, to allow, in certain limited areas, the law itself to be a genuine forum".[113] True, the fact that black victims were legally barred from testifying in court or initiating legal proceedings highly constrained the extent to which "pro-slave"

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[111] Genovese (1976: 119-120).
[112] Thompson (1975).
[113] Ibid, 265.

law could have indeed served as a "genuine forum" for reckoning with the moral gravity of such offences. Nevertheless, as Eugene Genovese observed:

> "The positive value [of benevolent slave law] lay not in the probability of scrupulous enforcement but in the standards of decency they laid down in a world inhabited, like most worlds, by men who strove to be considered decent. These standards could be violated with impunity and often were, but their educational and moral effect remained to offer the slaves the little protection they had".[114]

With Thompson and Genovese, it might be argued that, insofar as interracial relations in antebellum Southern society had been indeed been interpreted and evaluated through *the forms of law,* such legislation may have curbed, to some extent, the measure and brutishness of violence to which blacks were subjected. The protection of slaves by antebellum criminal law was sparse but not entirely insignificant. The positive value of "pro-slave" legislation becomes more apparent when compared with the crisis of "pro-black" criminalization in the post-Reconstruction decades. As I will argue in the next chapter, the failure to protect African-Americans from lynching in the post-Reconstruction decades was rooted in the removal of the two driving forces which impelled the development of "pro-slave" criminalization in the final antebellum decades (the self-interest of slave-owners, and the need to accommodate Northern criticism of Southern race relations). The paradox which is revealed by a comparison of the way in which incidents of racist violence were tackled before and after the abolition of slavery is that the formal conferral of constitutional rights on African-Americans and their de jure recognition as full citizens was followed by the removal of the weak legal protection which they enjoyed as "chattel personal". The relentless political exclusion of blacks after the demise of Reconstruction restored the situation in which their legal governance reflected only "a compact between their rulers" and precluded any element of self-governance. Yet, despite the elevation of their formal constitutional status, the revised terms of the compact between their rulers (most notably, the reconfigured relations between upper and lower class whites, and the relations between Southerners and Northerners) put African-Americans in an even more vulnerable position.

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[114] Genovese (1976: 48).

Chapter 3:

"Social Prejudices...May not be Overcome by Legislation": The Rise and Fall of Federal "Pro-Black" Criminalization Policy, 1865-1909

> *It must be considered that there is nothing more difficult to carry out, nor more doubtless of success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all those who would profit from the new order; this lukewarmness arising partly from fear of their adversaries, who have the law in their hands, and partly from the incredulity of mankind, who do not truly believe in anything new until they have had actual experience of it*
>
> *Niccolo Machiavelli, The Prince*

A. Introduction

Throughout the decade which followed the Northern triumph in the Civil War, the legal status of African-Americans was dramatically elevated. Slavery became constitutionally prohibited by the enactment of the Thirteenth Amendment in 1865. The Civil Rights Act (enacted in 1866) empowered African-Americans to own property, make and enforce contracts and sue and give testimony in courts. The Fourteenth Amendment (enacted in 1868) endowed them with the status of citizenship and enshrined their right to equal protection and to due process. The Fifteenth Amendment (enacted in 1870) forbade abridging the right to vote on grounds of race, colour, or previous condition of servitude. Additional pieces of federal legislation solidified suffrage protection, proscribed race discrimination in jury selection and provided for equal access of African-Americans to public transportation and public education. However, the elevation of the legal status of African-Americans failed to generate a sustained political commitment to equalizing their social and economic conditions. Following the collapse of Reconstruction[1] in the second half of the 1870s, America's race relations entered a new era of

[1] In American history, the term *Reconstruction* refers to the constitutional and political reforms that were debated and enacted in the wake of the Civil War. In particular, these reforms addressed two main issues. First, Congress had to consider how to reincorporate within the Union the Confederate states that had declared their secession from the United States between 1861 and 1865. These debates concerned, for example, the conditions which should be imposed on ex-Confederates in order to allow them to vote in national elections and to hold office in the national political system. The second focus

prolonged deterioration. Instead of diminishing the persecution and discrimination of African-Americans, the tremendous constitutional reforms of Reconstruction were followed by the radicalization of white supremacist consciousness. This radicalization found a dire expression in the upsurge of new forms of ritualized racist violence, associated with the proliferation of the Klan in the late 1860s and the torrent of lynching from early 1880s onwards.

Lynching had its roots in the culture of Southern vigilantism that had already taken hold in the colonial period. However, throughout the colonial and antebellum periods, lynching did not primarily target black victims.[2] Of more than three hundred victims of recorded lynching between 1840 and 1860, less than 10 percent were blacks.[3] Throughout the colonial and antebellum period, lynching was primarily used against whites who deviated from local standards of proper conduct, either by committing moral transgressions such as drunkenness, public indecency, prostitution, spouse-abuse and laziness, or by espousing unorthodox moral or political views (not least, support of abolitionism).[4] The recorded rates of lynching and the proportion of African-American victims began to climb dramatically from the early 1880s. Each year between 1882 and 1901 (with the single exception of 1890), more than 100 deaths by lynching were recorded (the numbers peaked in 1884 and 1892, with 211 and 230 victims respectively).[5] It was not until 1936 that the record of annual victims fell below 10, and not until 1952 that a full calendar year passed without a single incident of deadly lynching.[6] Moreover, despite the decrease in the total number of recorded incidents of lynching from 1901 onwards, the proportion of African-Americans among lynch victims increased dramatically, reaching an average of 90 percent between 1901 and 1909.[7] Between 1889 and 1918, 85 percent of lynching incidents nationwide had been recorded in the South.[8] By the end of this period, the South's share of national lynching rates amounted to 97 percent.[9]

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of Reconstruction reforms pertained to the civil status and constitutional rights of freedmen. The main dilemmas were whether freedmen should be recognized as full citizens, and whether they should be enfranchised. The conventional periodization refers to the period 1865-1877 as the Reconstruction era (see, e.g. Stampp (1967)). The literature on Reconstruction is vast. Some of the most authoritative studies include: Donald et al (2001); Foner (1988); Williamson (1984).

[2] Brown (1975).

[3] Genovese (1976: 32).

[4] Wyatt-Brown (1984: 425-493).

[5] Zangrando (1980: 6-7).

[6] Ibid, ibid.

[7] Williamson (1984: 185).

[8] Belknap (1997: 5). The highest rates of lynching were recorded in the states of Mississippi (539 Black victims), Georgia (492 Black victims), Texas (352 Black victims), Louisiana (335 Black victims), and Alabama (299 Black victims). All figures refer to the period 1882-1968 (Kennedy, 1997: 42).

[9] Belknap (1997: 5).

Of course, recorded victimization rates provide only a crude measure of the actual scale of lynching, its savageness, and its terrorizing effect on entire black communities. It can fairly be assumed that the frequency of unreported incidents and of those violent incidents which did not result in the victim's death significantly outnumbered the recorded figures. Moreover, the methods used by lynchers became increasingly sever and brutal over time.[10] Gradually, such relatively humane methods of execution as hanging and shooting were replaced by more torturing ones, e.g. having victims "maimed while still alive, their ears or fingers or genitals amputated, their bodies stabbed and cut, and their entrails pulled out before their eyes".[11] In addition, lynching rituals began to be conducted in front of "hundreds and sometime thousands of spectators" so that "it was not uncommon for railroads to run special 'excursion' trains to the site".[12] The cultish qualities of lynching in the New South were also illustrated by the circulation of photographic "images of mutilated black bodies, some of them horribly burned and disfigured", which "were purchased as picture postcards, and passed between friends and family like holiday mementoes, dutifully delivered by the U.S. mail".[13] Against this backdrop, the outright failure of the legal system to deter lynchers or to impair its legitimacy among both ordinary and elite Southerners is conspicuous. As late as 1940, it was testified before Congress that legal action was taken against those responsible for only 40 of the approximately 5,150 incidents of lynching which were recorded since 1882 (amounting to 0.07% of recorded incidents).[14] By 1933, only four Southern states recorded any convictions.[15]

In this chapter, I will examine the way in which the problem of white supremacist violence was tackled from 1865 to 1909, and consider the political, cultural and institutional conditions which shaped the character of legal policies in this field. The discussion so far has already hinted at the main puzzle with which this chapter will grapple: what were the forces which led to the removal of legal protections from African-American victims in the late nineteenth century, a mere two decades after they were provided with constitutional rights to equal protection of the laws? This question is particularly puzzling given the fact that Southern states had already institutionalized some forms of "pro-black" criminalization

[10] Williamson (1984: 187).
[11] Garland (2005: 805).
[12] Williamson (1984: 187).
[13] Garland (2005: 794).
[14] Belknap (1997: 9).
[15] Ibid, ibid.

policy in the antebellum period, in an era in which blacks were not yet legally or socially recognized as bearers of civil rights. Furthermore, as we will show in this chapter, the nadir of "pro-black" criminalization in the late nineteenth century transpired shortly after the federal government successfully established its authority to prosecute white supremacist perpetrators. What were the forces which led legislatures and crime-enforcement authorities at both the regional and national levels to abandon this path and to abdicate their responsibility to provide African-Americans with equal protection from racist persecution?

In **section B** of this chapter, I look at the political conditions which enabled the emergence of federal "pro-black" criminalization policy in the early 1870s (in the form of anti-Klan legislation) and at the historical developments which led to the demise of this criminalization regime shortly thereafter. The analysis of the emergence of the federal anti-Klan criminalization regime will focus on the role it played in tackling challenges of legitimation and coordination with which the federal administration was faced throughout Reconstruction. The analysis of the decline of this criminalization regime will focus on the interplay between processes which took place in the national and regional political arenas. These processes, I will show, eroded the commitment of national legislatures and administration to investing political capital in the mobilization of civil rights policies, and, simultaneously, removed any electoral incentives which could have impelled Southern legislatures to do so. While the discussion in section B gives focus to the political dimensions of criminalization policies, the next section focuses on the institutional dimensions of the processes through which criminal legislation is being enforced. In **section C**, I look at how the modus operandi of the Southern criminal justice system in the Jim Crow[16] era shaped the structure of the criminalization process. In particular, I consider the determinants which precluded the Southern criminal justice system from asserting its authority to monopolize the legitimate means of violence in the face of these public rituals of white supremacist terror. This discussion serves as a basis for exploring some general questions regarding the interrelations between the development of "pro-minority" criminalization regimes and broader processes of modernization and penal evolution. In **section D**, I recap the conclusions of our analysis, and place it within the broader historical trajectory of American "pro-black" criminalization policy.

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[16] In American history, the *Jim Crow era* is associated with the body of legal and political arrangements established in the South between 1877 and 1965 in order to reinforce the second-class status of African-Americans. The literature on the *Jim Crow* (also known as post-Reconstruction) era is vast; three authoritative studies are: Woodward (2001); Klarman (2004); Litwack (1998).

B. The Political Underpinnings and Effects of the Transformation of "Pro-Black" Criminalization, 1865-1910

B1. The Rise of Federal "Pro-Black" Criminalization Policy, 1865-1873

In 1865, the supply of cheap, plentiful, and easily controlled black labour upon which the Southern agrarian economy had relied throughout the colonial and antebellum periods was cut short by the political consequences of the Civil War. Following the abolition of slavery, Southern legislatures turned to devising new legal instruments in order to facilitate the extraction of black labour and to restore white supremacy. These measures were incorporated in the Black Codes. Under the Codes, the freedmen would have more rights than did free black before the War, but still be confined to a second-class civil status. The Codes explicitly excluded freedmen from the franchise. They also instituted a range of harsh criminalization policies aimed at regulating the movement and activities of freedmen.[17] In some ex-Confederacy states, the Codes subjected all freedmen who had "no lawful employment or business" to amercement or imprisonment.[18] They also attached draconian penal sanctions to minor offences such as petty larceny. In some states, stealing any property valued at 10$ or more was subjected to five years imprisonment.[19] These harsh criminalization policies were aimed at facilitating the exploitation of black labour through the institutionalization of the convict leasing system.

The enactment of the Codes was strongly resisted by Northern public opinion. The Codes were criticized as indicative of Southern inexorable refusal to accept the political outcomes of the War, and as demonstrating the urgent need to adopt stronger measures of federal enforcement for protecting freedmen's civil liberties. Contrary to the expectations of Southern governments, the passing of the Black Codes strengthened the political position of Radical Republicans, who supported both the imposition of stringent restrictions on the vote of former Confederates and a more intensive involvement of the federal government in governing Southern social and political institutions. After the 1866 elections, Radical Republicans gained considerably greater representation in Congress and were able to effectively shape the contours of civil rights policies. In 1867, Congress passed the Reconstruction Act which placed ex-Confederate states under military control.

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[17] Wilson (1980: 53).
[18] Friedman (1993: 93).
[19] Litwack (1998: 271).

Federal troops were assigned with enforcing the constitutional rights conferred to freedmen by the Thirteenth, Fourteenth and Fifteenth Amendments. It was within this political context (involving an intense interregional conflict, and heightened post-War expectations regarding the competency of the national administration to serve as the ultimate protector of civil rights) that the first experiment with establishing a federal "pro-black" criminalization regime in American history had took shape.

The emergence of the Ku-Klux-Klan in 1865 gave vent to the widespread anxieties of poor whites in the face of increasing economic competition with blacks and the loss of the symbolic prerogatives of belonging to a master race.[20] As C. Vann Woodward pointed out, the radical transformative effects of the incorporation of millions of ex-slaves to the region's wage-labour market was immediately felt, as "the Negroes invaded the new mining and industrial towns...and the two races were brought into rivalry for subsistence wages in the cotton fields, mines, and wharves".[21] The Klan was not a centralized and hierarchic organization. Rather, it brought together a "chaotic multitude of antiblack vigilante groups, disgruntled poor white farmers, wartime guerrilla bands, displaced Democratic politicians, illegal whiskey distillers, coercive moral reformers, bored young men, sadists, rapists, white workmen fearful of black competition, employers trying to enforce labor discipline, common thieves, [and] neighbors with decades-old grudges".[22] Some of its attacks were directed at white proponents of racial egalitarianism and operatives of the Federal Freedmen's Bureau. However, the primary focus of its actions targeted African-Americans who attempted to exercise the constitutional rights which had recently been conferred on them. Among other things, Klan terror targeted black voters in the ballots, intimidated black holders of public office, drove out black farm tenants, warded off interracial political associations, and menaced African-Americans who failed to "know their place" and comply with degrading white supremacist etiquette.[23]

The surge of white supremacist violence which swept the South in the late 1860s posed an evident challenge to the new model of federalism which emerged under Reconstruction.[24] And it was indeed met with firm legislative and enforcement responses by the federal government. The enactment of the 1870 Enforcement Act and the 1871 Civil

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[20] Williams (1996: 28).
[21] Woodward (1971: 211).
[22] Parsons (2005: 816).
[23] Tolnay & Beck (1995: chapter 2).
[24] Foner (1988: 245).

Rights Act (also known as the Ku-Klux-Klan Act) authorized federal agencies to police, prosecute, and adjudicate "the use of force or intimidation to keep citizens from exercising any right or privilege granted or secured to him by the Constitution or laws of the United States".[25] The Act was enforced by federal military troops (in some counties, through Presidential suspension of the right of habeas corpus).[26] Prosecutions were taken in federal courts, in which biracial jury composition was significantly more common (and less vulnerable to Klan intimidation) than in Southern state courts.[27] The Klan Act yielded a considerable volume of prosecutions in federal courts between 1870 and 1873, with high conviction rates (amounting to 74 percent in 1870).[28] The establishment of a federal framework of "pro-black" criminalization policy provided a path which was abandoned in later years because of a combination of political and institutional impediments which will be discussed in detail below. This path would be retaken only nine decades later, when the constitutional crisis in Little Rock, Arkansas (1957) would compel the federal administration to reassert its authority to penalize white supremacist brutality.

The emergence of the anti-Klan criminalization regime in the late 1860s can be attributed to the materialization of two major historical conditions. First, the growth of the Klan posed a challenge to the legitimacy of the federal government, which was heavily invested in the project of Reconstruction. Anti-Klan criminalization was embedded within the broader array of post-war political and constitutional reforms which sought to expand the powers of the national administration vis-à-vis state governments. The failure of Southern states to guarantee the fundamental liberties of African-Americans (as was clearly demonstrated by the Black Codes) was seen by Northerners as a quintessential example of the necessity of establishing a powerful national administration. Consequently, the success of the federal government in demonstrating its competence to protect freedmen in the South became a yardstick for measuring its ability to deliver these expectations. The rise of a new framework of federal legislation, and the high profile Ku Klux Klan trials which followed, communicated this message to both Northern and Southern audiences.[29]

Second, in considerable respects, the emergence of the anti-Klan criminalization regime was consistent with the interests of Southern elites in that particular historical

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[25] Ch. 114, 16 Stat. 140 (1870).
[26] Williams (1996: 46).
[27] Trelease (1971).
[28] Belknap (1987: 12).
[29] Blight (2002: 114-117).

moment. True, the abolition of slavery impaired the direct economic and political interest of Southern elites in protecting their black labour force. However, fretting that the unchecked rampage of Klan terror would prolong the presence of federal troops in the region and thus leave the South in a political limbo, Southern elites had an interest in curbing the flames of white supremacist brutality. This is consistent with William J. Wilson's general observation that, during the first two post-bellum decades, Southern elites preferred to tighten their paternalistic economic bondage with blacks than to align themselves with white supremacist rabbles.[30] Although distressed by having to ameliorate the arduous working conditions which prevailed before the War and to increase the costs of black labour, the planter elite recognized that a transition to a predominantly white labour force would inescapably require greater concessions. Their strategic solution was in many respects similar to the 'divide and rule' strategy which had served them well throughout most of the antebellum period (albeit under more propitious political circumstances): relying on black labour while impeding the political empowerment of both African-Americans and poor whites.[31] Indeed, in contrast with the antebellum period, Southern elites did not take an active role in mobilizing for the enactment of this regime of "pro-black" criminalization, as the extension of federal authority in the region had clearly constrained their political leverage. However, in comparison with other federal policies enacted throughout the Reconstruction era, anti-Klan legislation served some purposes which were consistent with the interests of Southern elites.

B2. The Nadir of "Pro-Black" Criminalization and the Growth of Lynching, 1873-1909

The crisis of federal "pro-black" criminalization policies derived from the collapse of the political order which prevailed during Reconstruction. By the late 1870s, the two major conditions which facilitated the emergence of anti-Klan criminalization policies in the late 1860s (namely, the commitment of national and Southern governments to guarantee African-Americans' civil rights, and the compatibility of these policies with the interests of Southern elites) were no longer in operation. In this subsection, I will show how the structural changes which took place in both the regional and national political arenas following the demise of Reconstruction inhibited the development of adequate legal responses to the problem of lynching.

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[30] Wilson (1980: 54-55).
[31] Mandle (1979); Williamson (1984).

B2.1. The Nadir of "Pro-Black" Criminalization and the Ascendancy of White Supremacy in Southern Politics

In the decades which followed the collapse of the antebellum political order, Southern politics became a site of fierce struggle between revolutionary and reactionary forces. These forces had vied with another in an effort to extend or to contain the unprecedented opportunities for the redistribution of political and economic power created by the swift incorporation of millions of formerly disenfranchised and enslaved blacks into the Southern electoral and economic systems. As we saw earlier, the abolition of slavery significantly compromised the bargaining power of poor whites. Their economic predicament created incentives for Southern politicians to invest in the mobilization of popular demands to erect tighter restrictions on black economic competitiveness.[32] The effective mobilization of this revanchist agenda enabled racial conservatives to win the lion's share of state and local offices during the first half of the 1870s.[33] However, given the reluctance of Southern elites to grant their full support to such initiatives (in an attempt, as noted above, to facilitate their reliance on black labour), Southern legislatures did not develop systematic ideological and institutional frameworks for the economic and political exclusion of African-Americans until the 1880s.

The major catalyst for the intensified pursuit of racial exclusion from the 1880s was the effort to stunt the rise of the Populist Party, which sought to capitalize the full transformative potential of this unstable economic and political constellation. In an effort to build a cross-racial political coalition, Populists spotlighted the converging interests of black and white farmers and urban workers in challenging the hegemony of the planter elite. Among other things, Populists called for abolishing vagrancy laws and the institution of convict leasing (which, besides its humanitarian breaches, was criticized as a means for breaking the unionization and collective bargaining power of white miners and farmers).[34] They also demanded the removal of legal barriers to African-Americans' ability to own land or to seek employment opportunities outside plantations.[35]

The rise of the Populist Party posed a radical challenge to Southern elites. In an effort to remove this challenge, Southern elites had abandoned their previous strategic preference to divide and rule the working class through using racial animus to impede the

[32] Woodward (1971: 211-12).
[33] Perman (1984).
[34] Gottschalk (2006:49).
[35] Bloom (1983: 39).

development of class-consciousness and collective bargaining power. In order to rein in the rise of the Populist Party, Southern elites had to bind themselves in political alliance with the white masses.[36] This political alliance was stabilized by the radicalization of white supremacist consciousness in Southern culture. The new white supremacist ideologies which gained ground during this period served to legitimate disenfranchisement crusades by portraying African-Americans as unfit to vote and incapable of holding political offices. Expressing this view, a prominent Southern publicist had asserted in 1905 that it was essential to suppress the black vote "as it would have been to suppress the votes of all the Southern mules and oxen, had a Republican Congress, in the spirit of Caligula...seen proper to confer the suffrage on them".[37]

The radicalization of Southern white supremacist consciousness fomented the growth of lynching and, at the same time, impeded the mobilization of effective legal responses to such terror. From the mid 1880s onwards, the sanguinary efforts of lynchers to preclude black participation in the democratic process were entirely consistent with the plethora of legislative measures erected by Southern policymakers in order to nullify the black vote. Disenfranchisement policies ranged from ostensibly colour-blind measures (such as literacy tests and tax polls) to more blatantly racist schemes such as the enactment of the Grandfather Clause (requiring voters to prove that their ancestors had the right to vote).[38] By 1903, every Southern state had passed legislation which de facto disenfranchised African-Americans.[39] The combination of extralegal violence, fraud, and disenfranchisement laws radically transformed the composition of the electorate throughout the South. In Louisiana, for instance, the number of African-Americans registered to vote plummeted from 130,344 in 1896 to 5,320 in 1900 and reached an ultimate low of 1,772 in 1916, almost a 99 percent reduction.[40] Because of the prevalence of white supremacist terror, these registration figures overstate turnouts. In Mississippi, black voter turnout was estimated at 29 percent in 1888, 2 percent in 1892, and 0 percent in 1895.[41] The representation of African-Americans among legislatures and holders of public office vanished accordingly. No African-Americans sat in the Mississippi legislature after 1895, down from a high of 64 in 1873. In South Carolina's lower house,

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[36] Williamson (1984).
[37] Quoted in Litwack (1998: 246).
[38] McAdam (1999: 68).
[39] Klarman (2004: 12).
[40] McAdam (1999: 69).
[41] Klarman (2007: 77).

which had a black majority during Reconstruction, only a single African-American representative remained in 1896.[42]

In turn, the entrenchment of all-white legislatures mobilizing around white supremacist policy platforms led to unprecedented recourse to legislative measures in order to symbolize and enforce white supremacist social conventions. Thus, whereas up until the mid 1880s, "localities could strike their own compromises in race relations, try their own experiments, and tolerate their own ambiguities",[43] from this historical moment onwards, conformity with white supremacist codes became increasingly enforceable by legal mechanisms. Southern legislatures, as noted by Leon Litwack, began to "segregate the races by law in practically every conceivable situation in which whites and blacks might come into social contact".[44] For example, in South Carolina, the law prohibited textile factories from permitting black and white labourers to "work together in the same room, to use the same entrances, doorways, or stairways at the same time, or the same lavatories, drinking water buckets, pails, cups, dippers or glasses at any time".[45] In Atlanta, a municipal ordinance segregated black and white prostitutes by allocating them to separate blocks.[46]

With the dismantling of the political significance of the black vote, any electoral incentives which could have motivated Southern politicians to address the escalating tide of lynching were removed. African-Americans were, once again, relentlessly deprived of access to the vehicles through which criminal justice policy was shaped. Although some moderate Southern legislatures and social movements openly criticized lynching, such dissenting voices were politically marginal and inconsequential. Interestingly, such criticism was usually framed as a plea for the restoration of law and order rather than as a call to transform the structure of racial domination within which lynching was embedded.[47] The majority of Southern politicians appealed to the white masses by vindicating or even celebrating lynching. Governor Vardaman of Mississippi bragged that "every Negro in the state will be lynched" if necessary to maintain white supremacy.[48] Governor Blease of South Carolina announced that he would rather resign his post and "lead the mob" than use

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[42] Klarman (2004: 32).
[43] Ayers (1992: 137).
[44] Litwack (1998: 233).
[45] Litwack (1998: 233).
[46] Ibid, 236.
[47] Gottschalk (2006: 64). This example of the recourse to the rhetoric of 'law and order' to promote a liberal agenda highlights the historical contingency of contemporary uses of this term.
[48] Klarman (2007: 79).

his office to protect a "nigger brute" from lynching.[49] To symbolize his point, he planted a finger of a lynched African-American in the gubernatorial garden.[50]

B2.2. The Nadir of "Pro-Black" Criminalization and Northern Retreat from Reconstruction

The imperviousness of Southern political system to the grievances of African-Americans put to the test once again the commitment of national political and legal institutions to the constitutional ideal of equal protection. Lynching posed an evident challenge to the authority of the federal government. By sabotaging the ability of the legal system to provide African-Americans with due process, lynching had blatantly defied the competence of the national administration to defend the most elementary rights pledged by the Constitution, including the right to life. Yet, this time, the challenge was not met by a firm reassertion of federal commitment to guarantee civil rights in the South. The inactions of national administrations throughout more than two decades in which white supremacist terror spread across the South reflected the wider demise of the political forces which impelled the emergence of anti-Klan criminalization policies less than two decades earlier.

The fall of the anti-Klan criminalization regime, and, more generally, of the set of political ideals and commitments which this regime embodied, was brought about by two major shifts in the national political arena: declining Northern support of racial egalitarian reformism, and the tighter constitutional constraints imposed by the Supreme Court on the further development of federal civil rights policy. From the mid 1870s, Northern public opinion increasingly supported the pursuit of interregional reconciliation and was willing to acquiesce to Southern oppressive racial practices to facilitate that aim.[51] Northern elites expressed their concerns of the antidemocratic implications of sustained military rule in the South.[52] The severe economic recession which began in 1873 put heavier fiscal constraints on the national administration and intensified the Northern unease about the heavy budgetary costs which the institutionalization of federal authority in the South had necessitated. The economic crisis had also diverted public attention from issues of racial equality and impelled the federal government to invest in new policy domains in which it could more easily legitimate its authority vis-à-vis state governments.[53]

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[49] Ibid, ibid.
[50] Williamson (1984: 188).
[51] Blight (2002: 123-125); Klarman (2004: 13).
[52] Klarman (2007: 62).
[53] Ibid, ibid.

Besides the principled objections to the excessive expansion of federal powers, Northern opposition to Reconstruction also reflected a profound sense of ambivalence regarding the required pace and direction of the move toward equalizing African-Americans' civil rights.[54] The constitutional reforms of Reconstruction exceeded what was originally envisioned by the majority of Northerners as the preferable outcome of the Civil War. Even Abraham Lincoln, in his 1858 debate with Democrat Stephen Douglas, denied having been "in favour of bringing about in any way, the social and political equality of the white and black races" and insisted that "blacks must remain inferior".[55] As we saw in the previous chapter,[56] Northern support for the abolition of slavery was not entirely motivated by egalitarian sentiments, and, at any rate, it hardly put to the test the commitment of Northern society to eradicate its own white supremacist social and political institutions. In contrast, the further institutionalization of the egalitarian principles of Radical Reconstruction could have generated acute challenges of legitimation for the established structure of political and economic power in the North. From the early 1870s, these concerns found expression (and, in turn, were intensified by) allegations of corruption and incompetence of African-American office holders in Southern governments.[57] With the defeat of the Republican Party in the Congressional elections of 1874 (in which a 110-seat Republican majority in the House turned into a 110-seat deficit), elite groups within the Party began to support the granting of amnesty to former Confederates and the termination of military rule in the South.[58] It also became clear that control over the House would enable Democrats to block funding for the enforcement of existing civil rights legislation and to prevent the passage of additional reforms.[59] In 1876, the Republican presidential candidate, Rutherford B. Hayes, won on a platform of sectional reconciliation and decided to withdraw federal troops from the South. Consequently, the institutional machinery which enabled the federal government to combat the first wave of Klan violence was dismantled. The number of federal court cases prosecuted under the Enforcement Act dropped from a high of 1,271 in 1873, to 954 in 1874, 221 in 1875, and only 25 prosecutions in 1879.[60]

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[54] Klinker & Smith (1999: chapter 3).
[55] Quoted in Marx (1998: 121).
[56] See chapter 2, Section D2 of this dissertation.
[57] Foner (1988: 388-389).
[58] Klarman (2007: 62).
[59] Klarman (2007: 63-64).
[60] Marx (1998: 72).

The Supreme Court's civil rights jurisprudence in the post-Reconstruction era posed additional constraints on the development of "pro-black" federal criminalization policy.[61] As Michael Klarman points out, "even Republican justices rejected social equality among the races and disfavoured large expansions of federal power to protect the rights of blacks".[62] In its landmark decision in the *Civil Rights Cases* (1883), the Supreme Court held that Congress lacked constitutional authority to outlaw discrimination by private individuals and organizations, and that its powers under the Fourteenth Amendment extended only to actions taken by state and local governments.[63] In *United State v. Harris* (1883), the Court applied this logic to the question of Congress' criminalization power under the Reconstruction Amendments.[64] The Court declared Section 2 of the Civil Rights Act of 1871 (under which Klan perpetrators had been prosecuted during the 1870s) unconstitutional on the theory that the power of the federal government to enforce the Equal Protection Clause applied only to state action, not to state inaction. In the specific case, four African-American men were removed from a county jail in Crockett County, Tennessee by a group of 20 white supremacist vigilantes led by Sheriff R. G. Harris. The four men were beaten and one was killed. The defendants, who were charged with conspiring to deprive the victim of the equal protection of the laws, demurred to the indictment and questioned the authority of the federal administration to indict them. In accepting their appeal, the Supreme Court reasoned that the Fourteenth Amendment "is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, not a guaranty against the commission of individual offenses".[65] The fact that Southern states inexorably eschewed bringing lynching perpetrators to justice was not recognized by the Court as a valid ground for warranting federal action. This constitutional reasoning reflected the prevailing view among Northerners, who, by the late nineteenth century, were ready to assent that the "Afro-American problem...had to be worked out in the South without external intervention".[66]

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[61] Scaturro (2000).
[62] Klarman (2007: 68).
[63] *Civil Rights Cases*, 109 U.S. 3 (1883).
[64] *United States v. Harris*, 106 U.S. 629 (1883).
[65] Ibid, at 638.
[66] Klinker & Smith (1999: 73).

C. The Institutional Dimensions of the Nadir of "Pro-Black" Criminalization in the Post-Reconstruction Era

So far, I discussed the way in which the transformation of the politics of race in both the national and regional political arenas had shaped the character of anti-racist criminalization policies in the Reconstruction and post-Reconstruction eras. I demonstrated how a cluster of structural shifts which led to the collapse of Reconstruction and to the entrenchment of Jim Crow impeded Southern and national legislatures from developing adequate legal responses to the problem of white supremacist violence. This inquiry has contributed to our understanding of one of the central questions of this study: under what conditions is "pro-minority" criminal legislation likely to emerge? Still, despite the failure to establish a new criminalization regime for tackling lynching and other rampaging forms of white supremacist terror, it is clear that these incidents violated multiple offences in the criminal codes of Southern states.[67] This provokes the question: what were the historical dynamics which led the Southern criminal justice to abdicate its responsibility to prevent lynching and to penalize its perpetrators? To be sure, the poor performance of criminal justice systems in protecting members of marginalized minority groups is all too familiar. Yet, the manifest way in which the Southern criminal justice system had institutionalized this common failure in the heyday of lynching was nevertheless peculiar (particularly when understood as a retreat from the formal acknowledgment of its enforcement responsibility in the antebellum and Reconstruction periods). Thus, a corresponding question arises: what are the general lessons that this manifest abdication of enforcement responsibilities tells us about the conditions under which adequate protection of members of marginalized minority groups is likely to be provided? In this section, I will address this twofold question. The analysis will take a close look at how the modus operandi of the Southern criminal justice system and the wider cultural landscape of the New South affected the structure of the criminalization processes through which the protection of African-Americans had to be pursued.[68]

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[67] Garland (2005: 809).

[68] The analysis will be informed by the general discussion offered in the first chapter (pp. 25-30) for characterizing the cultural and institutional preconditions which enabled and constrain the enforceability of "pro-minority" criminal categories.

C1. The Transformation of the Southern Criminal Justice System as a Catalyst to the Removal of Criminal Law's Protection from Black Victims

Throughout the Reconstruction era, racial reformers repealed various provisions of the Black Codes and launched ambitious plans to restructure the modus operandi of the Southern criminal justice system. For example, a significant body of state and federal legislation forbade racial exclusions from jury service.[69] In South Carolina, such legislation went as far as to require that the racial composition of juries would mirror the racial composition of the electorate.[70] However, the impact of these reforms was bounded by the wider difficulties in sustaining the political vitality of Reconstruction. The checks they imposed on the conduct of Southern crime control institutions collapsed together with the demise of the Reconstruction project.

From the late 1870s onwards, as part of the broader proliferation of white supremacist lawmaking, Southern legislatures and courts had devised new measures for excluding African-Americans from the criminal process. New segregation laws forbade black lawyers' "presence in some courtrooms and made them liabilities to clients in others".[71] Courts regularly excluded blacks from juries and disregarded black testimony.[72] Throughout the post-Reconstruction decades, the Supreme Court reiterated that the Fourteenth Amendment forbade statutory exclusion of blacks from jury service.[73] However, at the same time, it tacitly allowed Southern states to nullify this constitutional principle through establishing mechanisms of de facto racial exclusion in jury selection[74] and set evidentiary requirements which made it virtually impossible to prove the discriminatory aspect of such practices.[75] For example, in jurisdictions where jurors were selected from voter lists, the mass disenfranchisement of African-American voters served to justify their absence from juries.[76] In practice, Michael Klarman points out, "between 1904 and 1935, the Court did not reverse the conviction of even one black defendant on the ground of race discrimination in jury selection, even though blacks were universally

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[69] Klarman (2004: 39).
[70] Litwack (1998: 247).
[71] Klarman (2004: 65).
[72] Litwack (1998: 247).
[73] *Strauder v.West Virginia*, 100 U.S. 303 (1880); *Neal v. Delware*, 103 U.S. 370 (1880).
[74] Kennedy (1998: 172-178); Nieman (1989: 400-401).
[75] Schmidt (1983).
[76] Klarman (2004: 42).

excluded from Southern juries".[77] The pervasiveness of institutional racism was apparent in virtually all aspects of the administration of criminal justice in the South. A study of sentencing practices in Georgia in 1882 revealed that blacks served twice as long as whites for burglary and almost five times as long for larceny.[78] For more severe offences, blacks were disproportionately subjected to capital punishment. Between 1882 and 1930, 81 percent of the legal executions in Southern states were inflicted on black offenders.[79]

Perhaps the most egregious symptom of the role played by the Southern criminal justice system in enforcing racial domination was the entrenchment of the convict leasing system from the early 1870s onwards.[80] Although the practice of leasing prisoners to private individuals was instituted well before the onset of the Civil War (and was also customary in the North), it reached an unprecedented scale in the New South.[81] The institutionalization of the convict leasing system served the converging interests of Southern states and economic elites. For the states, it enabled to reduce expenses on the erection of penitentiaries in a political setting in which "spending money on black criminals was at the bottom of every white taxpayer's list of priorities".[82] At the same time, it enabled economic elites to regain an almost unqualified control over the black labour force notwithstanding the formal abolition of slavery. Paradoxically, contrary to the intended aims of its initiators, the wording of the Thirteenth Amendment (prohibiting "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted") might have channeled the efforts of Southern economic elites to establish new mechanisms for exploiting black labour to the penal sphere. The use of black convicts served as a major engine of the transition of Southern economy from agrarian to industrial modes of production in the post-War decades.[83] Unlike slave-owners, contractors ran no risk of losing a valuable investment if a convict was worked to death. The appalling mortality rates of convict labourers bear witness to their atrocious working conditions, which were often severer than those imposed under slavery.[84] In Alabama, for example, 41 percent of convict labourers died in 1870.[85]

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[77] Klarman (2004: 43)
[78] Litwack (1998: 252).
[79] Tolnay & Beck (1992: 100).
[80] Oshinsky (1996); Mancini (1996).
[81] Bosworth (2009: 34).
[82] Ayers (1992: 154).
[83] Gottschalk (2006: 49).
[84] Oshinsky (1996).
[85] Litwack (1998: 272).

By the late nineteenth century, then, the Southern criminal justice system became fully invested in stabilizing white supremacy. The pervasiveness of institutional racism precluded Southern policing and judicial institutions from attempting to protect African-American victims notwithstanding their formal conferral with constitutional rights to due process and equal protection. In considerable respects, African-Americans became more vulnerable to wanton white supremacist victimization after their formal political emancipation. With the collapse of the network of informal social controls used to reinforce the inferior status of blacks during the antebellum period, white Southerners became increasingly tolerant of barbarous forms of racial degradation that were hitherto deemed censurable (and indeed destructive to the monetary interests of slave-owners). The Freedmen's Bureau documented some of the more heinous instances in which extralegal violence was used for compelling compliance with degrading racial etiquette, e.g. the killings of a black person for "refusal to move his hat" or "to give up a whisky flask".[86] The pervasiveness of such violence in Southern everyday life brought one observer to note in 1866 that, "whatever the Negro legal right, he knows how far he may go, and where he must stop" and that "habits are not changed by paper laws".[87]

C2. Southern Exceptionalism and the Path Not Taken

The simultaneous intensification of both legal and extralegal executions of black offenders in the New South is widely documented in the historical literature.[88] As Anthony Marx pointed out, "Jim Crow was enforced as much by hoodlums as by local authority" and "often the two were indistinguishable, as elected judges and other officials turned a blind eye to the mobs who had voted them into office".[89] The simultaneous escalation of both legal and extralegal violence provides an appalling illustration of the interplay between two different forms in which criminal justice systems operate to reinforce social marginalization: their tendency both to over-penalize and to under-protect members of marginalized communities.[90] Yet the way in which this familiar tendency was pronounced in the practices of Southern crime control institutions also has some broader implications for our understanding of the interrelationship between the trajectories of modern penal evolution and of "pro-minority" criminalization. As noted above, Southern crime control

[86] Kennedy (1998: 39).
[87] Quoted in Litwack (1998: 230).
[88] Tolnay & Beck (1992: chapter 4).
[89] Marx (1998: 141).
[90] Sampson and Wilson (1995).

institutions had expanded enormously during the post-War decades. This expansion was facilitated by the removal of one of the major impediments to the institutional development of crime control apparatuses before the Civil War: the resistance of slave-holders. This resistance was couched in terms of a principled objection to excessive state and federal interventions in local affairs, but it also reflected the partisan interests of the planter elite in preserving the hybrid structure of authority over the governance of slaves' conduct.[91] In light of the decisive influence of the planter elite on public policymaking in the antebellum South, by the mid 1860s, penal and policing apparatuses in the South were remarkably underdeveloped vis-à-vis Northern counterparts. For example, in 1850, while Georgia and Massachusetts held a comparable population (900,000), Massachusetts's incarcerated population was almost thirty times higher (1236 vs. 43).[92] In the post-Reconstruction era, however, the Southern criminal justice system expanded dramatically (not least due to its heavy involvement in buttressing racial repression). For example, between 1874 and 1877, the imprisonment rate of African-Americans in Mississippi and Georgia grew threefold.[93]

In this context, the post-1880 proliferation of public torture lynching appears to have posed an evident challenge to the ability of Southern states to monopolize the means of legitimate violence within a crucial moment for establishing their political legitimacy and professional authority. Conducted in front of large crowds, these rituals imitated ancient forms of ritualistic public execution which had been formally abolished by the legal system decades earlier.[94] As David Garland noted,[95] the mushrooming of public torture lynching in late nineteenth century Southern society sets it apart from what is widely regarded as the "normal" trajectory of modern penal culture: the monopolization and bureaucratization of penal authority by state institutions and the disappearance of rituals of popular vengeance from the agora.[96] In order to understand why Southern states eschewed confronting this manifest challenge to their authority to monopolize the means of legitimate violence, we should consider two peculiar features of Southern culture: the inexorability of its white supremacist norms and its deep-seated vigilante tradition.

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[91] Gottschalk (2006: 48).
[92] Gottschalk (2006: 289).
[93] Kurshan (1996: 140).
[94] Garland (2005: 807-809).
[95] Garland (2005).
[96] Foucault (1979).

In the late nineteenth century, new dehumanizing racist discourses had gained currency in Southern culture. These discourses gave emphasis to the issue of black criminality as the ultimate symbol of the disruptive social consequences which, according to Southerners, were caused by the forced abolition of slavery.[97] With the increasing influence of Social Darwinism on American sociological, political and ethical thought in the late nineteenth century, American scientists had increasingly resorted to methodologies and insights drawn from evolutionary theory for rationalizing the need to maintain white supremacy.[98] Two main theses drawn from natural selection theory were particularly salient in fulfilling this ideological task. The first thesis contended that African-Americans had been undergoing a process of retrogression following their unleashing from the civilizing influence of their masters.[99] Expounding this theory in an 1890 scientific article, Nathaniel S. Shaler, then Dean of the Lawrence School of Science at Harvard University, advised the white population to be alert "lest the old savage weeds overcame the tender shoots of the new and unnatural culture".[100] Such scholarly myths resonated with widespread anxieties among white Southerners about the coming of age of a new generation of blacks who were more questioning of their "place" and less inclined to render absolute deference to members of the ruling caste. These anxieties were paradigmatically expressed by an 1895 editorial in a Louisiana newspaper, lamenting that "the younger generation of Negro...have lost that wholesome respect for the white man, without which two races, the one inferior, cannot leave in peace and harmony together".[101] These common views inflamed the moral panic regarding blacks' propensity to engage in sexual crime, which soon became the most salient justification of lynching.

The second thesis which emerged in the scientific literature, extending the Darwinian "survival of the fittest" theme to the analysis of racial conflicts, depicted white supremacy as an outcome of a struggle for existence in which the more fitted race shall forcefully triumph while the inferior one will be extinct. In his 1896 book *Race Traits and Tendencies of the American Negro*, renowned Southern statistician Fredrick Hoffman analyzed the data on the upsurge of lynching as "representing fairly the increasing tendency

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[97] Arguably, the political uses of black criminality in the New South laid the foundations for the broader configurations of crime-talk and governance which would spread throughout the nation in the 1960s. See: Wacquant (2001: 117).
[98] Hawking (1997: chapter 5); Fredrickson (1971: chapter 8).
[99] Williamson (1984: 120).
[100] Quoted in Williamson (1984: 120).
[101] Quoted in Ayers (1992: 135).

of colored men to commit this most frightful of all crimes" (i.e. rape). He further insisted that no relief could be found in educative programs but only in the "gradual extinction" of the Negro race.[102]

The moral panic regarding the vulnerability of white women to the ferocious sexual impulses of predatory black males served as a socially acceptable outlet to deeper anxieties which suffused the collective psyche of Southern society. The rise of Social Darwinism both granted scientific credibility to these anxieties and radicalized their tone. For example, a contemporary Southern historian asserted that: "rape, indescribably beastly and loathsome always, is marked, in the instance of its perpetuation by a negro, by a diabolical persistence and malignant atrocity of detail that have no reflection in the whole extent of the natural history of the most bestial and ferocious animals".[103] As feminist readings of the ritualistic forms and conventional apologetics of lynching illuminate, the intensity of this moral panic was fomented by the confluence between the racist and patriarchal creeds of Southern culture. The "drama of lynching", as Jacquelyn Hall persuasively argued, had served to reaffirm patriarchal stereotypes of women's defencelessness, to reinforce traditional imagery of Southern women's "sexual pureness", and to interdict intimate relationship between members of the two races.[104] It is also worth mentioning that although the protection of women from sexual victimization by black offenders overshadowed any competing 'justifying aim' of lynching, in practice less than 26 percent of those lynched were charged with, let alone tried or convicted of rape or attempted rape.[105]

The measures taken by white Southerners against black suspects reflected their profound distrust of the suitability of ordinary legal mechanisms to eliminate what they perceived as an extraordinary threat to their physical security and cultural identity. This sense of distrust had its origins in the deep-seated tradition of Southern vigilantism.[106] The introduction of the Reconstruction Amendments failed to eradicate these popular sentiments. Furthermore, as Michael Klarman notes, "most Southern whites found black jury service, which they conceived as a form of political officeholding, even more

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[102] Quoted in Williamson (1984: 122).
[103] Ibid, ibid.
[104] Hall (1993).
[105] Zangrando (1980: 8).
[106] Ayers (1984).

objectionable than black suffrage".[107] As demonstrated above, these constitutional reforms had hardly alleviated the discriminatory practices of Southern courts, policing and carceral institutions. Yet the principle which these reforms conveyed – namely, the idea that black offenders and victims were entitled to the same procedural safeguards and measure of protection to which whites were entitled – was fiercely resented by white Southerners. Rituals of popular vengeance thus became salient sites for rejecting Northern interventionism and reasserting Southern values. Paradoxically, however, it was the very retreat of Northern politicians and federal authorities from keeping their commitment to enforce this principle that enabled lynching to thrive across the region from the early 1880s onwards. And in a corresponding paradox: Southerners' claims that lynching reflected "the outcry of a conservative and lawloving people against the abuses of a system of criminal procedure which has become intolerably inefficient"[108] gained political momentum in the very moment in which the Southern criminal justice system abdicated any meaningful commitment to the constitutional procedural safeguards which allegedly inhibited its competence to tackle the "unconventional threat" of black criminality.

The fallacy of the common vindication of lynching was most evidently demonstrated by the many cases in which mobs had seized hold on their victims after they had already been sentenced to death. The mushrooming of lynching was not rooted in the preventive shortcomings of law enforcement agencies (which, as we saw above, only became more focused on targeting black suspects and more capable – institutionally – of tackling black criminality). Rather, it grew out of the interplay between, on the one hand, the functional role which these rituals played in Southern culture (symbolizing Southern defiance of the de-jure inclusion of blacks into the framework of American citizenship),[109] and, on the other hand, the refusal of both Southern and federal law enforcement agencies to reclaim their authority in light of combination of institutional racism and political convenience. Lynching was accepted as the continuation by other means of the policies which were institutionalized at the very same moment in order to symbolize and to enforce the second-class status of African-Americans (not least, segregation, disenfranchisement and disproportionate penalization of black offenders). The coexistence of legal and extralegal mechanisms of retribution embodied Southerners' conceptions of how retributive justice should be delivered in a white supremacist polity. The Southern system of penal retribution was restructured in order to

[107] Klarman (2004: 39).
[108] Taylor (1907).
[109] Garland (2005).

institutionalize two sets of standards: the first was applicable to members of the ruling caste and subjected to constitutional principles of due process; the second was applicable to members of the inferior race and administered through the infliction of spectacularly cruel and unusual punishment. The acquiescence of the federal administration in the establishment of this racially-skewed system of penal retribution reflected its general approach amid the entrenchment of Jim Crow. The reasoning of the Supreme Court while upholding the constitutionality of state-sanctioned segregation in the South in the landmark case of *Plessy v. Ferguson*[110] encapsulated the dominant way in which this position was articulated in late nineteenth century American law:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption...that social prejudices may be overcome by legislation...We cannot accept this assumption...Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences... If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane[111]

D. Conclusion

In this chapter, I examined the way in which the problem of white supremacist violence had been tackled between 1865 and 1909. My analysis has showed that the measure of protection provided to victims who belong to marginalized minorities does not hinge on whether they are legally recognized as entitled to equal citizenship rights. The conditions of existence of "pro-minority" criminalization are more closely associated, as this study suggests, with the attempted contribution of such reforms to tackling challenges of legitimation and coordination with which political authorities and elite groups are faced.

Throughout the Reconstruction era, the performance of the national administration in protecting the safety and liberty of freedmen emerged as a salient yardstick of its competence to enforce the new model of national citizenship. The devising of federal mechanisms for bringing white supremacist terrorists to justice was embedded within a broader array of federal policies. As George Fredrickson has shown, these policies had been precipitated by the crystallization of new public expectations (particularly among Northern elites) for the

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[110] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[111] Ibid, at 550.

benevolent exercise of power by the national administration in the wake of the Civil War.[112] As I argued in section B, because of political changes which crystallized from the mid 1870s in both regional and national politics, the conditions which enabled the enactment and facilitated the enforceability of anti-Klan legislation were no longer operative. Northern public opinion lost its enthusiasm for robust federal civil rights policy, and was now willing to permit white Southerners a free hand in ordering Southern race relations. The institutional machinery which enforced anti-Klan legislation in the 1870s was dismantled following the removal of federal troops from the region and the stringent constitutional limits imposed by the Supreme Court on the development of federal civil rights policy. At the same time, the increasing electoral leverage of poor whites and the dissolution of the economic and political incentives which had motivated Southern elites to support the criminalization of racist violence in the antebellum period removed the political conditions which could have impelled Southern legislatures to develop adequate enforcement mechanisms at the state and local levels. These unfavourable political and institutional transformations crystallized at the very same moment in which the radicalization of racist sentiments in Southern culture expressed itself (among other things) in the rise of new ritualized forms of white supremacist terror. The nadir of "pro-black" criminalization in the post-Reconstruction era reflected the wider crisis of racial egalitarianism in the late nineteenth century. As we will see in the next chapter, the conditions which would impel American society to reinstitute a new form of federal "pro-black" criminalization regime crystallized only in the second quarter of the twentieth century.

My analysis has emphasized that, from the late 1870s onwards, the development of "pro-black" criminalization policies became highly constrained by the structural transformations which took place in the regional and national political arenas. However, it is important to emphasize that these structural transformations did not entirely preclude the potential for developing legal responses to white supremacist violence. Even after the collapse of Reconstruction, the emergence of legal responses to lynching and Klan terror remained plausible. After all, as we already saw in the second chapter, "pro-slave" criminalization reforms can gain ground even within political settings which are inexorably committed to the preservation of white supremacy. Accordingly, it is arguable that the Jim Crow legal order could have accommodated limited efforts to criminalize extralegal forms of excluding blacks from the ballot, jury box or from the public sphere in general. Such measures could have legitimized the institutionalized forms of pursuing

[112] Fredrickson (1965).

such exclusion (e.g. disenfranchisement and segregation) by portraying the legal system as committed in principle to guaranteeing blacks' constitutional rights.

In this context, my analysis in this chapter has challenged not only the conventional liberal position which predicts that the extension of equal constitutional rights would be followed by the amelioration of social and political conditions of marginalized minorities. It also urges us to specify in more detail the conditions under which the Marxist thesis regarding the conditions of existence of "pro-minority" reforms is likely to be substantiated. At the descriptive level, my analysis drew attention to the role played by contingent cultural factors (such as the deep-seated resentment to the rule of law and the championship of vigilantism in Southern culture) in affecting the likelihood that "pro-minority" reforms will be introduced in order to legitimize social inequalities. At the normative level, this discussion had reemphasized the double- edged character of "pro-minority" criminalization. Even if, as stressed by crude instrumentalist strands of Marxist thinking, such reforms serve to legitimize and thus to stabilize the status quo, they nevertheless entail persuasive and symbolic elements which are not insignificant. Given the pervasiveness of white supremacist norms in all aspects of Southern culture, it would be simplistic to assume that the mere introduction of additional legislative reforms could have provided African-Americans with meaningful protections. Yet the refusal of both Southern and national lawmakers to endorse even this limited form of recognition of the moral gravity of lynching provides an appalling indicator as any of the extent to which late nineteenth century American society was permeated by white supremacist norms.

Chapter 4:

The Emergence of National Civil-Rights Criminalization Policy, 1930–1968

> *"My brethren say that when a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen...and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected...What the nation, through Congress, has sought to accomplish in reference to that race is, what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freemen and citizens; nothing more. The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel recognition of their legal right to take that rank, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained."*[1]

A. Introduction

With this bold statement, Justice John M. Arlen concluded his dissenting opinion in the *Civil Rights Cases* (1883). By holding that Congress lacked constitutional authority to outlaw racial discrimination by private individuals, this decision hindered the development of federal anti-lynching legislation through the following decades. Justice Arlen's dissenting voice represents the 'path not taken' by the American legal system throughout the post-Reconstruction era.[2] In rejecting this view, the Supreme Court gave expression to the dominant mode of thinking about the appropriate (minimal) role which the national government ought to play in governing race relations.[3]

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[1] *Civil Rights Cases, 109 U.S. 3, 62* (1883)

[2] Tushnet (2008: 45-68).

[3] Klarman (2004: 9).

In this chapter, I examine the social and political processes which transformed the dominant constitutional and political understandings of the role of the federal government in tackling racist violence. With the culmination of this paradigm shift, Congress established a new legal framework for criminalizing racially-motivated interferences with a range of "federally protected activities" (including jury service, enrollment in public schools, and the use of interstate common carriers).[4] The major goal of this new legal framework was to provide the federal administration with suitable enforcement tools for remedying the failure of Southern authorities to provide African-Americans with adequate protection. Tellingly, this objective echoed the very same vision which was articulated by Justice Arlen and rejected by the majority in the *Civil Rights Cases* eight decades earlier.

The rise of new constitutional theories which expanded the scope of Congress's legislative power had certainly played a role in removing the major constitutional obstacles which inhibited the development of federal anti-racist criminalization policy in earlier decades. Yet, these shifts in constitutional thinking reflected a much broader transformation in American political values and institutional structures. In this chapter, we will look at how these dramatic transformations provided the driving forces for the emergence of a new framework of federal "pro-black" criminalization in the mid 1960s. We are primarily concerned with the following two questions. First, what led the federal administration to abandon its previous position (to which it adhered for nearly eight decades) and to reclaim its authority to penalize white supremacist violence in the South? Second, what were the major effects which this campaign and legislative reform produced?

In addressing the first question, I will argue that the policy U-turn taken by the federal government was shaped by the interaction between four major forces: a) the proliferation of the Civil Rights Movement (particularly, between 1954 and 1965); b) the incorporation of black voters into the national electorate; c) the impact of Cold War dictates on domestic civil rights activism and policymaking; d) the massive expansion of the institutional capacities and political legitimacy of the federal government during the New Deal era. Operating in tandem, these forces created new pressures of legitimation and coordination with which the federal administration was compelled to grapple. The introduction of the new legal framework of

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[4] 18 U.S.C § 245.

"federally protected activities" became politically and institutionally feasible because it provided the federal government with suitable tools for containing these challenges. It is within this context, I will argue, that we can illuminate both the achievements and the failures of the "federally protected activities" regime.

A succinct introduction of the structure and main arguments presented in this chapter follows. In **section *B***, I will delineate the social transformations which enabled African-Americans, for the first time in their history, to take an active role in shaping criminalization policies. In particular, I will survey the demographic and economic shifts which facilitated the formation of the Civil Rights Movement and the incorporation of African-American voters into the national electorate.

In **section C**, I examine the trajectory of the campaign to enact a federal framework of "pro-black" criminalization, beginning with the founding of the NAACP in 1909 and concluding with the passing of "federally protected activities" legislation in 1968. In particular, I look at how the interactions between grassroots mobilization and electoral mobilization around the problem of black victimization enabled African-Americans to reconstruct the political meanings of this problem. The analysis shows how the Movement's strategic use of 'the victimization frame' for spotlighting structural aspects of the Southern caste system effectively galvanized Northern revulsion against the system of Jim Crow. In turn, this shift in Northern public opinion had dramatically transformed the dynamics of electoral competition between the two major national parties. Most notably, it impelled the Democratic Party to invest greater political capital in sponsoring civil rights reforms. The passing of the "federally protected activities" legislation had served as a product and facilitator of these structural shifts in the national political arena.

In **section D**, I show that the new challenges of legitimation faced by the federal government throughout the Cold War era added a distinctive dimension to the struggle for federalizing anti-racist criminalization policy. As Mary Dudziak has shown, throughout the Cold War era, the impact of racist incidents on the nation's international reputation emerged as one of the most momentous forces in shaping domestic civil rights policy.[5] The need to

[5] Dudziak (2000).

'disown' Southern racist brutality created strong incentives to utilize the expressive qualities of criminal law by means of passing a new framework of "pro-black" federal legislation.[6] At the same time, the Cold War setting (particularly throughout the heyday of McCarthyism) also inhibited the development of civil rights protest insofar as such campaigns had spotlighted the antidemocratic and illiberal aspects of the American political system. In this section, I will examine how the interplay between the contradictory impacts of Cold War politics enabled and constrained the mobilization of "pro-black" criminalization policy during this period.

Another important trend which characterized the post-War period was the entrenchment of a novel (and unprecedentedly expansive) vision of the role of the national administration in tackling the nation's core social problems. From the launching of the New Deal programs in the mid 1930s, the traditional division of labor between federal, state, and local governments was eroded, and the federal government consistently expanded its institutional capacities and political authority. In **section E**, I examine how the efforts of the federal government to reinforce the New Deal vision of federal policymaking created new incentives and opportunities for enacting a new framework of "pro-black" federal criminalization. I will also pinpoint the role played by the introduction of "federally protected activities" legislation in facilitating the efforts of the federal administration to establish itself as a key policymaker in the criminal justice field.

In **section F**, I analyze the major effects brought about by the introduction of "federally protected activities" legislation. In assessing the preventive performance of this framework, I notice the curious fact that, contrary to the expectations that accompanied the six decade campaign to federalize civil rights criminalization policy, this legislation generated only a negligible volume of prosecutions following its high-profile enactment. However, I suggest that this fact does not necessarily imply the futility of this reform. Although, as I will argue in sections ***C-E*** of this chapter, this legislation was essentially driven by efforts to utilize the expressive qualities of "pro-minority" criminalization in order to tackle challenges of legitimation, it was also embedded within a broader network of policy measures which worked to dismantle the Southern caste system and thus to alleviate the criminogenic conditions which

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[6] On criminalization as a form of expressing the community 'disowning' of the outlawed conduct, see: Feinberg (1994: 77-80).

produced this particular form of black victimization. However, because this wider political framework did not tackle the distinct mechanisms of racial stratification which prevailed in Northern economy and society, this new regime of "pro-black" criminalization neglected the patterns of black victimization which thrived in the North. I argue that, while the prioritization of Southern patterns of white supremacist victimization was almost inevitable given the political opportunity structure within which the Movement had to operate in the 1950s and 60s, it created a pattern of path dependence which continues to inhibit the development of adequate responses to the problem of black victimization even today.

In evaluating the political effects generated by the introduction of "federally protected activities" legislation, I consider the assets and liabilities which emanated from the Movement's strategic use of the problem of black victimization as a vehicle for mobilizing wider egalitarian reforms. I argue that the political legacy of this campaign reflects the interplay between two contradictory effects which "pro-minority" criminalization campaigns are prone to engender. On the one hand, this legislation reaffirmed the principled entitlement of African-Americans to equal protection and served as a symbolic form of political inclusion. On the other hand, because this campaign focused on spotlighting Southern forms of overt racial brutality, it obscured the harmfulness embedded within numerous 'softer' forms of racial domination, which, by that time, had already permeated Northern economy and society. This failure illustrates the tendency of "pro-minority" criminalization to overemphasize sensational forms of social harm and to divert public attention from various other forms of harm to which minority groups are disproportionately vulnerable in light of their socio-economic and cultural marginalization. The introduction of a new form of "pro-minority" criminal legislation reassures public opinion that the problem of minority victimization is being tackled effectively and reinforces the myth of equal protection. Paradoxically, the success of these campaigns in triggering a policy reform works to de-radicalize the struggle for egalitarian change (and to hinder the structural reforms necessary for tackling the symbiotic root causes both of these specific forms of victimization and of numerous other forms of social harm).

B. The Social Underpinnings of the Emergence of Political Mobilization around the Problem of Black Victimization

B1. The Social and Political Impacts of the Great Migration

As we saw in the previous chapter, following the collapse of Reconstruction, Southern society instituted various formal and informal mechanisms which prevented African-Americans from realizing their constitutional rights. The stability of the Jim Crow political order rested on a symbiosis between a set of demographic, economic and political conditions. Among other things, these conditions precluded African-Americans from developing mechanisms of collective action through which they could influence public policy. When the twentieth century dawned, over ninety percent of the black population still resided in the eleven ex-Confederacy states and over eighty percent of that population engaged in cotton farming (mainly as sharecroppers or tenant farmers).[7] African-Americans were deprived of any meaningful influence on the electoral system at both the regional and national levels. In the South, where blacks constituted more than one third of the overall population, disenfranchisement effectively neutralized their numerical strength.[8] As late as 1940, black voter registration was extremely low, ranging between a regional-low of 0.3% of the black voting-age population in Mississippi and a high of 8.1% in Arkansas.[9] Across the rest of the nation, blacks constituted too small a proportion of the electorate to impel the national Republican Party to address their political repression. Unsurprisingly, in the late nineteenth century, the Republican Party came to recognize its traditional association with the black vote as an electoral liability, rather than as a political asset.[10]

The social conditions which buttressed the political disempowerment of African-Americans began to be eroded from the 1910s onwards, with the advent of the Great Migration. The Great Migration entailed the mass movement of African-Americans out of

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[7] Wilson (1980: 65).
[8] McAdam (1999: 70).
[9] Ibid, 79.
[10] Ibid, 69.

the South as well as from rural-to-urban areas within that region.[11] To be sure, the forces pushing blacks away from the South (including, political repression, economic deprivation, and physical insecurity) had long been present. However, it was only at this historical moment that African-Americans were provided, for the first time, with alternative employment opportunities outside the Southern agrarian economy. These opportunities were created by the acute shortage of labour experienced in the Northern economy.[12] The booming demand for unskilled and semiskilled labour in the steel mills, packinghouses, factories and the railroads of the North was triggered by the combination of heavy wartime production demands,[13] and the marked decline in the flow of European immigrants.[14] In addition, the availability of a huge stockpile of cheap black labour enabled Northern industrialists to constrict the bargaining power of white workers after the Clayton Act of 1914 facilitated unionization and collective bargaining.[15] Although the Great Depression temporarily reduced job opportunities in the North during the 1930s, the next two decades had witnessed unprecedented levels of black northward migration. Demand for black labour skyrocketed amid expanding war production throughout WWII and the Korean War and the economic boom of the post-War years. Overall, between 1910 and 1960, nearly five million Southern blacks relocated to the North, where they enjoyed relatively unimpeded access to the ballot. Most fundamentally, it became clear that the "Negro question" could no longer be treated as an exclusively "Southern affair", as the South's portion of the nation's black population declined from roughly 90% in 1900 to 70% in 1940 and to less than 50% in 1960.[16]

At the same time that shortage of labour in Northern economy provided blacks with new employment opportunities, the Southern agrarian economy had experienced a crisis which curtailed the demand to farm labour. Severe hardships were experienced by black farmers in light of a combination of various factors, including technological developments which

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[11] The literature on the Great Migration is vast. For two comprehensive accounts, see: Fligstein (1981); Marks (1989).
[12] Klarman (2004: 100).
[13] Piven & Cloward (1979: 190).
[14] The number of European immigrants had tumbled from 1.2 million in 1914 to only 111,000 in 1918. Klarman (2004: 100).
[15] Piven & Cloward (1979: 191).
[16] Klarman (1994: 67).

increased the mechanization of Southern agriculture, the reduced demand for cotton (the price of which plummeted from a high of 35 cents per pound in 1919 to 6 cents in 1931),[17] the damage caused to the cotton and sugar crops by a boll weevil infestation and by a series of storms and floods between 1914 and 1917,[18] and the farm policies of the New-Deal which significantly reduced cotton acreage in an effort to stimulate demand.[19] In addition to precipitating the black odyssey northwards, the crisis of Southern agriculture boosted a massive rural-to-urban population movement within the South and fostered processes of urbanization and industrialization throughout the region.[20]

Nationwide, between 1890 and 1960, the proportion of urban blacks increased from 20 percent to 62 percent (and, by 1970, it swelled to 81 percent).[21] Urbanization went hand in hand with the integration of black labourers into the nation's industrialized economy, although the concrete terms of such integration (namely, disproportionate concentration in semi-skilled, manual and servant work) made them particularly vulnerable to future business downturns and structural shifts of the capitalist modes of production (as the post-1968 crisis of the Keynesian-Fordist capitalist economy will prove all too clearly).[22] These structural economic and demographic shifts destabilized the political structure which precluded the mobilization of "pro-black" criminalization policy during the previous decades. They also facilitated the emergence of new vehicles of grassroots and electoral mobilization for civil rights reforms.

B2. The Great Migration as a Catalyst to the Incorporation of Blacks into the American Political System

Prior to the Great Migration, a vast majority of the black population was geographically dispersed in rural areas and subjected to the pervasive web of legal, vigilante, and economic controls which reinforced the semi-feudal system of Southern agrarian economy. By contrast, the new demographic patterns which crystallized following the relocation of millions of African-Americans in urban ghettoes were characterized by the spatial concentration and

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[17] McAdam (1999: 75).
[18] Wilson (1980: 66).
[19] Piven & Cloward (1979: 190).
[20] Klarman (1994: 55)
[21] Wilson (1980: 71).
[22] Ibid, 71-76.

separation of the black community. Since, in the words of Loïc Wacquant, "the ghetto... is, by its very makeup, a doubled-edged sociospatial formation: it operates as an instrument of exclusion from the standpoint of the dominant group; yet it also offers the subordinate group partial protection and a platform for succour and solidarity in the very movement whereby it sequesters it",[23] these emerging demographic patterns created conditions which were conducive to the development of new instruments of collective action.

The combination of spatial concentration and racial separation precipitated the development of cohesive communal institutions - cultural, civic, religious, educational, and political. For example, between 1941 and 1945, enrolment rates in black colleges more than doubled.[24] Between 1934 and 1946, association membership in the NAACP grew fivefold.[25] Together with the black churches which mushroomed in the black ghettoes, these institutions served as the main mediums for forging a sense of collective identity, and for establishing an organizational framework for mass protest. In addition, the incorporation of blacks into the industrialized economy across the nation provided them with a measure of available resources and economic independence, both of which are positively correlated with participation in social movements.[26] To be sure, the bulk of the urban black population continued to be disproportionately concentrated in low-skill occupations. However, their unfettering from the relentless apparatuses of social control to which they were subjected in the South provided them with a relatively unimpeded degree of freedom of association, as well as with greater economic independence.

Concurrently with the formation of vehicles of grassroots mobilization, the electoral bargaining power of African-Americans had increased steadily. Between 1910 and 1960, the number of black voters in the presidential elections grew eightfold (while the black population increased 92 percent).[27] Moreover, the Great Migration involved a mass departure of African-Americans from states in which they were most repressively disenfranchised to states which exerted immense influence on the outcomes of presidential contests.[28] Of the five million black

[23] Wacquant (2001: 103).
[24] McAdam (1999: 102).
[25] Ibid, 103.
[26] Jenkins (1983).
[27] McAdam (1999: 79).
[28] Ibid, 79.

migrants who moved northwards between 1910 and 1960, 87% settled in industrial centres in seven highly populous swing states (New York, New Jersey, Pennsylvania, Ohio, Michigan, Illinois, and California). Given the structure of the American presidential voting system - namely, population-based pro rata representation to each individual state and first past the post (winner-takes-all) provision - these seven states provided nearly eighty percent of the votes necessary to elect a President by the mid century.[29]

Another salient trend which carried enormous impact on the electoral leverage of African-American voters was the transition of the black vote from the Republican Party to the Democratic Party. The political stability of the Southern post-Reconstruction racial caste system was stabilized by the fixed cross-racial patterns of party affiliation. Since the demise of Reconstruction, with the instalment of the 'white primaries' to the Democratic Party and the erection of sweeping disenfranchisement policies in the general elections, the South was characterized as a one-party region. At the same time, the dominance of the Southern branch of the national Democratic Party enabled it to effectively veto proposed civil rights reforms. During this period, black voters consistently aligned themselves with the Republican Party.

These voting patterns started to erode from the early 1930s, as the increasing representation of African-Americans in the national electorate impelled candidates of both parties to compete for the black vote.[30] The presidential elections of 1936 demonstrated the revolutionary effects of this development. For the first time since the formal franchise of African-Americans (i.e. after seventeen consecutive presidential elections), a majority of black voters supported the Democratic Party's presidential candidate, a factor which proved significant for securing Roosevelt's landslide victory. The new trends which became evident in the 1936 presidential contest gained further momentum throughout the following decades. As my analysis will show, although the increasing leverage of the black vote would fail to outweigh the influence of anti-civil rights constituencies throughout the next decades, it will have a considerable transformative effect on the contours of civil rights policymaking.

To summarize, in this section, I have delineated the structural demographic and economic changes which enabled African-Americans to develop new instruments of

[29] Ibid, 80.
[30] Ibid, 83.

collective action through which they could, for the first time, prod policymakers to respond to their grievances. As we will see in the next sections, the process whereby the Movement's organizations (particularly, the NAACP) became capable of mobilizing policymakers to address the predicament of black victims in the South progressed piecemeal, and entailed a fierce struggle between the Movement and its adversaries. The analysis introduced so far will help us to gain a better understanding of the structural conditions which enabled and constrained the mobilization of "pro-black" policy reforms during this era.

C. The Struggle for Federalizing Civil Rights Criminalization Policy

C1. From the Founding of the NAACP to Brown v. Board of Education

The NAACP was founded in 1909 in the aftermath of a race riot in Springfield, Illinois, in which at least seven African-Americans were killed. The riot illustrated the urgency of establishing an effective civil rights organization to struggle against governmental discrimination and Klan persecution. In particular, this sense of urgency grew out of the exacerbation of racist violence and segregation laws in the North throughout the early decades of the twentieth century, as the influx of black migrants fed the racial prejudice of Northern whites.[31] This escalation found expression in an enormous increase in Ku Klux Klan membership across the North. By the 1920s, there were an estimated 35,000 Klansmen in Detroit and 50,000 in Chicago.[32] From the moment of its founding, the organization treated the enactment of an anti-lynching bill as one of its primary objectives.[33] Importantly, this campaign was interlinked with other campaigns aimed at removing legal obstacles to blacks' political and economic participation, most notably, the campaigns against segregation in public schools, racial discrimination in the criminal process (particularly in Southern states) and disenfranchisement.

From the mid-1910s, the NAACP established systematic mechanisms for compiling and publishing data on national lynching trends. While the ability of black leaders to participate in public debate on required anti-lynching policies was still highly constrained, they gained a

[31] Klarman (2007: 115).
[32] Ibid, ibid.
[33] Zangrando (1981: 18).

greater success in inducing national politicians to support federal legislation. In 1918, the first proposal for a federal anti-lynching bill (the Dyer Bill) was put before Congress. The proposed bill defined lynching a federal felony, and sought to establish the authority of federal institutions to prosecute and try participants in lynch mobs. Although the Bill passed the House of Representatives in 1922, it was defeated in the Senate due to a filibuster by the white Southern Democratic block. The campaign for federal anti-lynching legislation regained momentum in the 1930s, but persistently failed to win a majority support in Congress.

The public resonance of the NAACP campaign against lynching demonstrates the political progress made by African-Americans throughout the interwar period. However, the fact that this campaign repeatedly failed to generate legislative reforms suggest that, by that period, the necessary preconditions for the materialization of a policy change were not ripe yet. This observation is valid with respect to the four major processes which eventually facilitated the enactment of "federally protected activities" legislation in the 1960s (namely, the development of effective strategies of grassroots mobilization; the materialization of electoral incentives for sponsoring "pro-black" legislative reforms; the urgency of defending the reputation of American democracy abroad; and the need to reinforce public expectations of federal leadership). As this section focuses on the interactions between the first two of these processes, let us now move to reflect on the way in which the structuration of the national politics of civil rights and the characteristics of black activism from 1909 to 1954 had enabled and constrained the development of this "pro-black" criminalization campaign.

The limited success of the early campaign for federal "pro-black" criminalization and the contours of the politics of race in the national electoral arena: Although black voters were gradually regaining access to the ballot throughout the intensification of the Great Migration, up until the 1940s, their electoral leverage was not significant enough to outweigh the influence of Southern voters. This was particularly evident during the 1930s, when the Southern wing of the Democratic Party effectively vetoed civil rights proposals. In order to secure Southern support of the major undertaking of his presidency, the New Deal programs, President Roosevelt chose to avoid head-on conflicts with the South over the racial issue.[34] In his appeals to Northern black voters, Roosevelt emphasized that the most constructive path

[34] Piven and Cloward (1979: 197).

for ameliorating the economic and social conditions of African-Americans lay in integrating them as beneficiaries of the New Deal programs of relief, recovery and reform, rather than to sponsor civil rights laws. Accordingly, he refused to endorse anti-lynching legislation.[35]

Throughout the 1940s, African-Americans voters continued to gain further electoral influence. Their political empowerment was facilitated by a cluster of landmark constitutional decisions which fortified their voting rights. In 1944, the Supreme Court held that the exclusion of blacks from participation in the primaries to the Democratic Party was unconstitutional.[36] The Court overturned its previous holding (decided only eight years earlier by a unanimous vote) which rejected a constitutional challenge to such exclusion on the ground that it did not constitute state action under the Fourteenth Amendment.[37] The decision in *Smith* facilitated the integration of blacks into the ranks of the Democratic Party, and further weakened the veto power of white Southerners.[38] These changes led to the expansion of the Democratic Party's civil rights agenda, as was powerfully illustrated by President Truman's dramatic decision in 1948 to issue an executive order desegregating the army.

Truman's position on the problem of black victimization reflected the increasing commitment of the Democratic Party to the racial egalitarian cause. In a Special Message to Congress on Civil Rights delivered on February 2, 1948, Truman declared his support for a federal anti-lynching bill. The fact that this presidential pledge was not translated into legislative reforms during Truman's second term in office (1949-1953) was partly caused by contingent historical circumstances, such as the diverting effect of the Korean War and the chilling effect of McCarthyism on the nation's receptiveness to the Movement's grievances (which will be discussed in detail below). However, it also reflected a more structural impasse which constrained civil rights reformism in the 1940s and 1950s. Indeed, the incorporation of African-Americans into the New Deal coalition intensified the competition over the black vote, and impelled both parties to vie with one another in terms of civil rights policy platforms. However, as long as both parties failed

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[35] Ibid, ibid.
[36] *Smith v. Allwright, 321 U.S. 649 (1944).*
[37] *Grovey v. Townsend, 295 U.S. 45 (1935).*
[38] Lawson (1976: 37-42).

to establish a stronghold among black voters, they continued to be dependent on the votes of white Southerners and thus had to avoid antagonizing opponents of civil rights reforms.[39] This constellation remained in force throughout the 1950s. In the presidential elections of 1956, for example, Eisenhower's victory was secured by his ability to win nearly 40% of the black vote and 48.9% of the votes of white Southerners.[40] Consequently, the politics of race throughout that period was marked by a constant tension between brave egalitarian rhetoric and moderate implementation of policy reforms.

The limited success of the early campaign for federal "pro-black" criminalization and the contours of black activism: The limited success of the NAACP's anti-lynching campaign also reflected the ineffectiveness of the strategies of grassroots mobilization used by black activists up until the 1950s. To be sure, the NAACP's legal battles were not without their successes. Alongside the anti-lynching campaign, the organization conducted intensive litigation campaigns which challenged the constitutionality of various practices of crime enforcement in the South,[41] racial segregation in public education,[42] and disenfranchisement.[43] These campaigns generated a cluster of landmark victories in federal courts and succeeded in elevating the salience of the struggle for racial justice. However, by the late 1940s, black leaders increasingly came to recognize that the struggle for racial equality could not be won in federal courts alone.[44] This recognition reflected the emerging black experience with the limited power of judicial achievements to bring about social change, as many of the practices that were outlawed by courts failed to be eradicated in light of the persistence of white supremacist norms across the nation. This recognition led them to intensify the recourse to more popular forms of collective action and mass protest.[45]

The genius of the strategy used by the Civil Rights Movement between 1954 and 1965 lay in the way in which it brought into synergetic interaction two tactical vehicles: legalistic campaigns and non-violent 'direct action' protest. The litigation campaigns of the

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[39] Klarman (1994: 136).
[40] Ibid, 132.
[41] Klarman (2004: 117-134).
[42] Tushnet (2005).
[43] Klarman (2004:135-142).
[44] Piven & Cloward (1979: 203-211).
[45] Ibid, 208.

NAACP induced federal courts to declare that a range of governmental practices in the South had been inconsistent with American constitutional values. The mobilization of masses of non-violent African-Americans who demanded to realize the rights conferred to them by federal courts signalled to Northern whites that the black struggle was, in its essence, a plea to American society to live up to its own manifested ideals. In particular, the combination of litigation in federal courts and non-violent direct action protest was effective in spotlighting the stark contradiction between America's declared political values and the governmental and social practices which continued to prevail in the South.[46]

Within this strategic framework, the long-standing removal of protections from black victims in the South emerged as an effective symbol of the Movement's broader claims. Given the history of Southern resentment of "forced racial integration from above" (i.e. by means of federal legal intervention), it was nothing but predictable that the twofold strategy of the Movement would incite a new surge of white supremacist vigilantism. The intensive recourse by the NAACP to federal courts for challenging Southern racial practices enhanced the sense of sectional defensiveness of white Southerners. The mobilization of hundreds of thousands of black protestors to Southern streets (demanding the realization of constitutional rights from which they were de facto deprived for decades) created multiple opportunities for Southern mobs to use terrorist measures in order to vent their resentment. However, as Michael Klarman has argued, in the late 1940s, Southern black leaders had come to recognize that such escalation was necessary to compel the federal government to take more aggressive steps toward the abolition of Jim Crow.[47]

In particular, the Movement's leadership devised a strategy known as "creative tension", "pursuant to which peaceful civil rights demonstrators would provoke, and then passively endure, violent assaults from Southern law enforcement officers and unofficial mobs, with the hope of reaping a public opinion windfall from a horrified viewing audience".[48] Within this strategic framework, the appalling experiences of black victims emerged as a salient issue of political mobilization. As put by Robert Zangrando:

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[46] Crenshaw (1988: 1368).
[47] Klarman (1994:143).
[48] Ibid, ibid.

> "While the campaign against lynching was essential and sincere on its own terms, the NAACP also realized that it could be used to draw attention to other racial inequities... [a]t a time when the public refused to honor voting rights, integrated education, equal employment opportunities, access to public accommodation...the NAACP could gain a hearing by showing how violence threatened generally held Judeo-Christian and democratic values".[49]

C2. From Brown to Little Rock

In the mid-1950s, the Movement's strategic use of litigation in federal courts and non-violent direct action became fully developed. In May 1954, the NAACP reached the most momentous achievement in its entire history. In the landmark decision in *Brown v. Board of Education*, the Supreme Court finally declared on the unconstitutionality of racial segregation in public schools.[50] In the following years, recorded rates of white supremacist violence rampaged dramatically.[51] The spectacle of white supremacist mobs precluding the enrolment of blacks in public campuses and schools became one of the idiosyncratic symbols of the escalation of Southern defiance of the challenge of racial integration. Once again, ritualized forms of racial intimidation served to symbolize popular resentment of racial egalitarian reform.[52] This time, however, the political conditions provided African-American activists with greater opportunities to influence public opinion and national policymakers.

For observers today, *Brown* is usually perceived as an initiator of a transformative process whereby an anachronistic caste system came under increasing pressures and eventually collapsed. However, what appears in retrospect as an almost inevitable structural transition was experienced at the time as a moment of radical uncertainty. In part, this uncertainty was rooted in the profound ambiguity of the meanings and implications of *Brown*. The decision clearly established the unconstitutionality of de jure segregation in public schools on the ground that such segregation was inconsistent with the Equal Protection Clause of the Fourteenth Amendment. However, the Court remained silent on

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[49] Zangrando (1980: 18).
[50] *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954)
[51] Kennedy (1998: 63).
[52] Garland (2005).

many other mechanisms of degrading racial division (e.g., segregation in private schools; de facto segregation in public schools as a consequence of residential and economic disparities; or state-mandated segregation in other public institutions and facilities). Even on the question of desegregation in public schools, the Court ordered no immediate remedies and refused to endorse the NAACP plea to declare a deadline for the completion of desegregation.[53] This ambiguity was exacerbated after the decision in Brown II (1955), in which the Court stated that desegregation should proceed "with all deliberate speed".[54] This statement was criticized by the NAACP for tacitly providing Southern authorities with a justification for delaying or avoiding significant integration reforms for years. And indeed, the landmark court victory in *Brown* did not facilitate significant desegregation until the enactment of federal legislation in the next decade. In 1960, the proportion of black schoolchildren attending desegregated schools across the region amounted to only 0.15%, and in some Southern states (South Carolina, Alabama, and Mississippi) not a single black child attended a desegregated school.[55]

Notwithstanding its limited direct impact on desegregation, it would be wrong to conclude that *Brown* did not have a profound impact on American race relations in the long run.[56] Yet, in order to pinpoint the exact contribution of *Brown*, we should steer clear of uncritically accepting the conventional liberal celebration of the decision as an epitome of "judicial heroism",[57] not least due to the tendency of such interpretations to obfuscate our understanding of the enduring pervasiveness of racial segregation in public education[58] and housing.[59] Instead, I would suggest that it was the radical uncertainty which *Brown* provoked that impelled social movements and politicians to boost their efforts to eradicate or to preserve the foundations of Jim Crow.

Indeed, in *Brown,* the Court invalidated the constitutional framework through which Southern racial practices were legitimized and institutionalized throughout the preceding six

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[53] Klarman (2004: 313).
[54] *349 U.S. 294* (1955).
[55] Klarman (1994: 9).
[56] Feeley (1992).
[57] For a critique of this common liberal interpretation, see: Balkin (2002: 5).
[58] Clotfelter (2002).
[59] Massey and Denton (1998).

decades (namely, the 'separate but equal' doctrine).[60] The decision was followed by a decade of radicalization, in which, on the one hand, the Movement intensified its resort to its two main tactical vehicles (litigation and direct action), and, on the other hand, Southern white supremacist mobs enhanced their involvement in terrorizing African-Americans who attempted to exercise their civil rights. For its part, the Movement intensified its recourse to litigation in order to impel federal courts to reaffirm the precedent set out in *Brown*. Yet, the string of constitutional challenges posed by the NAACP during these years failed to push the Supreme Court to take any further step further in denouncing racial segregation per se throughout the subsequent eight terms.[61] Nevertheless, appeals to district federal courts to issue desegregation orders in the face of local obstructionism were, on occasions, more successful.[62] The combination of such remedies with the Movement's second tactical endeavour, namely, the marshalling of non-violent protestors who demanded local authorities to enforce court segregation orders, proved consequential (not so much in actually facilitating desegregation in Southern schools (as indicated by the figures presented above) but in attracting national attention to the ferociousness of Southern obstructionism).

From the Southerners' point of view, *Brown* was perceived as a paternalistic and unconstitutional encroachment on prerogatives that lay at the very core of the concept of states' rights. In March 1956, Southern Senators and Congressmen issued a "Southern manifesto", decrying *Brown* as a "clear abuse of judicial power" because it "substituted the Justices' personal political and social ideas for the established law of the land".[63] In the post-*Brown* era, the perceived urgency of thwarting racial integration impelled Southern politicians to vie with one another over being the most "blatantly and uncompromisingly prepared to cling to segregation at all costs".[64] "Moderation", Michael Klarman observes, "became a term of derision, as the political centre collapsed, leaving only 'those who maintain the Southern way of life or those who want to mix the races'".[65] Given the profound embedding of white supremacist vigilantism in Southern

[60] *Homer A. Plessy v. Ferguson*, 163 U.S. 537 (1896).
[61] Klarman (2004: 321).
[62] On the complex role played by federal courts in this setting, see: Peltason (1961).
[63] Quoted in Balkin (2001: 5).
[64] Klarman (2004: 390)
[65] Ibid, 390-391.

culture,[66] it was nothing but predictable that this widespread rejection of the legitimacy of judicially-mandated desegregation would also find expression in violent defiance of court orders. And indeed, episodes of cross burning, bombings and vandalism of black churches and NAACP branches became more common in the wake of *Brown*.[67] Mobs served at the forefront of Southern resistance to school desegregation. Their actions were not only tolerated by Southern authorities, but also endorsed by the most senior politicians at the regional political arena.[68]

The ramping up of white supremacist violence in the post-*Brown* epoch had an excruciating effect on individual victims and a terrorizing effect on their communities. However, such incidents effectively served to amplify the general messages asserted by the Movement. Whereas federal courts and administrations could more easily turn a blind eye to the plethora of ordinances issued by Southern legislators and municipalities in order to de facto preclude racial desegregation, widely-circulated media images of local mobs inhibiting black schoolchildren from enrolling in public schools in defiance of court segregation orders exposed the federal government to vehement criticism at home and abroad. Indeed, these images were highly consequential in advancing the Movement's strategic use of "television to make the protests of blacks irresistibly appealing to the large majority of the American people who were mostly indifferent to segregation when it remained distant but disliked it when forced to face the unpleasant measures needed to maintain it".[69] Nevertheless, between 1954 and September 1957, the Eisenhower administration persistently refused to intervene in racial desegregation hostilities. Eisenhower denied a role for the federal government in the prevention of local rioting and advocated gradualism (which gained currency as a euphemism for sustaining the segregationist status-quo) as the most judicious path forward.[70]

C3. From Little Rock to the Passing of "Federally Protected Activities" Legislation

The long-standing posture of federal non-involvement in Southern race riots faced its most testing moment in the constitutional crisis in Little Rock, Arkansas, in September 1957. The

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[66] See, in particular, my discussion in chapter 3 (section C2) of this dissertation.
[67] Belknap (1987: 30)
[68] Klarman (2004: 326).
[69] Barone (1990: 354).
[70] Klarman (2004: 324).

crisis was provoked when nine African-American schoolchildren tried to enrol in a local public high school after their admission had been ordered by a federal district court. Declaring that the students' enrollment entailed an "imminent danger of tumult, riot and breach of the peace and the doing of violence to persons and property", Arkansas Governor Orval Faubus proclaimed a state of emergency and ordered the Arkansas National Guard to surround the school and to prevent the entrance of the black students.[71] This blatant rewarding of local lawbreakers with state-enforced inhibition of a federal court's order escalated the conflict between Southern states and the federal administration. After weeks of intensive media coverage accompanied by vehement criticism of his failure to defend the constitution, President Eisenhower finally dispatched federal troops to the region. Military forces guarded the attendance of the 'Little Rock Nine' during the 1957-1958 school year, facing a fierce local resistance.

The Little Rock crisis triggered a remarkable departure from the position of the federal government during the previous eights decades. Nonetheless, Eisenhower insisted on the ad-hoc nature of his decision. He adhered to his principled objection to sponsoring federal civil rights criminal legislation on the ground that the ordinary regulation of criminal conduct had to remain within the exclusive jurisdiction of state governments. Accordingly, the Justice Department avoided seeking prosecutions of those involved in the Little Rock hostilities.[72]

However, while the crisis did not generate immediate legislative reforms, its more subtle political ramifications were remarkable. Most importantly, the Little Rock crisis enabled the Movement to reconstruct the meaning of the desegregation issue. The desegregation issue came to be seen as a litmus test of the authority of federal courts and of the determination of the Eisenhower administration in defending the Constitution. The strategic currency of such re-contextualisation was noticeable in the justifications provided by Eisenhower while advocating his decision to the American public. Eisenhower opened his special "Radio and Television Address to the American People on the Situation in Little Rock" by stressing that "our personal opinions about the [*Brown*]

[71] Klarman (1994: 328).
[72] Klarman (2004: 334).

decision have no bearing on the matter of enforcement".[73] He further clarified that the federal troops dispatched to Little Rock were there "to support our federal court system – not to enforce desegregation".[74] This distinction echoed widespread public attitudes of the time. In 1956, a Gallup poll revealed that more than 70 percent of whites outside the South believed that *Brown* was rightly decided, but only a small percentage (less than 6 percent) considered civil rights the nation's most important issue.[75]

The Supreme Court, which was generally reluctant to re-enter the desegregation fray, also emphasized this distinction between the political and the constitutional aspects of the Little Rock crisis in its important decision in *Cooper v. Aaron*.[76] *Cooper* involved a review of a decision issued by a district judge in favour of reprieving school desegregation in Little Rock for two and half years on the grounds that the right of African-American students to non-discriminatory admission to public schools should be balanced against the public interest in a smoothly functioning educational system (an interest which was infringed by the persistence of mob resistance to desegregation). The constitutional question at stake was whether a district judge was authorized to delay desegregation, once it had commenced, because of community resistance. In its unanimous decision, the Court declared that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights".[77] It further stressed that "the principles announced in [*Brown*] and the obedience of the state to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us".[78]

The need to reinforce federal authority compelled both the Eisenhower administration and the Supreme Court to tackle Southern impediments to racial desegregation. In turn, federal intervention served to bestow legitimacy on the Movement's cause. In this respect, the Little Rock crisis marks one of the earliest examples of an effective strategic utilization of the 'victimization frame' for boosting wider political reforms. By mobilizing around the problem of

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[73] "Radio and Television Address to the American People on the Situation in Little Rock", September 24, 1957, Public Papers of the President of the United States: Dwight D. Eisenhower, 1957, 690. Quoted in Klarman (2004: 421)
[74] Ibid, ibid.
[75] Klarman (2004: 365).
[76] *Cooper v. Aaron, 385 U.S. 1 (1958)*.
[77] *Cooper*, 358 U.S., 19.
[78] *Cooper*, 358 U.S., at 19-20.

Southern blacks' vulnerability to mob violence, the Movement sought not only to trigger a change in federal civil rights criminalization policies, but also to spotlight broader patterns of governmental discrimination and thus to galvanize public support of a structural political reform (i.e. the abolition of Jim Crow). This campaign effectively reconstructed the problem of civil rights obstructionism as a challenge to national interests and urged the federal administration to demonstrate its commitment to protecting these interests. By the early 1960s, the optimal instrument available to government for symbolizing and institutionalizing this commitment, the enactment of a new federal bill, lay just around the corner.

With the continuation of the post-*Brown* turmoil, the Kennedy administration (1961-1963) was confronted with a series of riots ignited by local defiance of court-ordered desegregation. These crises compelled the administration to involve federal troops on several occasions in attempt to restore basic standards of law and order. The most notable of these incidents took place in October 1962 at the University of Mississippi campus in Oxford. The upheavals were inflamed by local attempts to hamper the enrolment of the first African-American student. The student, James Meredith, was escorted by national guards to his first class - a seminar on American colonial history - through a crowd of several hundred jeering students and enraged mobs. The riots resulted in the killing of two African-Americans and the injuring of an additional seventy-five. However, although such events clearly demonstrated the relentless unwillingness of Southern authorities to enforce desegregation court orders, the President and the Justice Department regarded such federal interventions as "isolated and temporary departures from a general policy of leaving the problem of racist terrorism to the states".[79]

This position had been put under increasing pressures following the sea change in Northern public opinion. From the late 1950s, the Movement intensified its efforts to optimize the strategy of 'creative tension' by means of nonviolent civil disobedience. As explained above, this strategy brought masses of non-violent black protestors into high profile encounters with Southern police and white supremacist mobs, in a deliberate effort to attract Northern attention to the brutality invested in the maintenance of the Southern caste

[79] Belknap (1987: xi).

system.[80] This strategy was effectively pursued in the Montgomery Bus Boycott of 1955-1956, and it gained further momentum throughout the next decade. From 1960 onwards, groups of African-American activists engaged in "sit-in" protest. Non-violent protestors would sit together in segregated public areas and businesses (such as lunch counters, public libraries and theatres), and would eventually be forcefully evicted by Southern authorities enforcing the region's harsh segregationist codes. In another prolific campaign, known as the *Freedom Rides campaign*, civil rights activists tested the enforceability of a recent Supreme Court decision that recognized the right of passengers engaged in interstate travel not to be subjected to racial segregation.[81] Travelling from Washington D.C. into the Deep South, groups of African-Americans passengers sought to challenge local laws enforcing segregation, and to attract media attention to the non-compliance of Southern authorities with Supreme Court civil rights jurisprudence. The Freedom Rides were met by savage responses from Klan mobs, often with the complicity of local law enforcement authorities.[82]

By 1963, the strategy of "creative tension" had proven increasingly effective in inducing Northern public opinion to support the introduction of firmer federal measures for bringing Jim Crow to an end. Intensive media coverage of the brutal methods used by police forces against peaceful voting rights' marchers in Birmingham, Alabama in 1963 (including such measures as tear gas, truncheons, high-pressure hoses and dogs) was particularly influential in stimulating Northern revulsion against Jim Crow.[83] The shift in Northern attitudes toward civil rights was clearly reflected in public opinion polls. Whereas in September 1957, only 9 percent of respondents to the annual Gallop poll on "the most important problem facing this country today" put civil rights as the most urgent issue, in October 1963, these figures climbed to more than 50 percent.[84] Following this notable shift in public opinion, politicians naturally became more inclined to champion the introduction of a new framework for criminalizing anti-civil rights violence. As a result, the established practice of federal administrations since the Little Rock crisis - namely, ad-hoc dispatching of federal troops for taming the eruption of local resistance to court-ordered school desegregation - would give way to a more systematic legal framework.

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[80] Martin Luther King had defended the strategy of creative tension in his famous Letter from Birmingham Jail (see: http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf).
[81] *Boynton v. Virginia, 364 U.S.* (1960).
[82] Arsenault (2006).
[83] Garrow (1978).
[84] Rosenberg (1991: 130).

The foundations for this new regime of federal "pro-black" criminalization would be laid by the passage of the Civil Rights Act in July 1964. Among other things, the Act made it illegal to compel segregation of the races in public schools, public housing or employment. However, its contribution to expanding the enforcement powers of the federal criminal justice institutions was still limited. A series of racial atrocities which took place subsequent to the passage of the Act provided painful demonstration of the necessity of fortifying federal enforcement authority. On August 4 1964, four civil rights volunteers who participated in a voter-registration campaign in Mississippi (the *Mississippi Summer Project* campaign) were found dead.[85] Out of the four victims, only one was African-American. The unprecedented coverage of the event by the national news media might have been associated with the identity of rest of the victims, who, like most of the 1,000 participants in this project, belonged to middle and upper-class white families from the North. Mob violence against civil rights protestors persisted throughout 1964 and 1965. The brutal repression of demonstrations to secure blacks' voting rights in Selma, Alabama, in March 1965 was particularly influential in prodding President Lyndon Johnson to push for the enactment of a federal voting rights bill. Speaking before a joint session of Congress and to an estimated 70 million viewers, Johnson declared that protestors' "courage to risk safety and even to risk their lives" in pursuit of equality "awakened the conscience of this nation".[86] In August 6, 1965, President Johnson signed the National Voting Rights Act into law. While the Act outlawed various discriminatory practices which had long served to disenfranchise African-Americans, it did not establish effective mechanisms of crime enforcement for prosecuting interferences with blacks' voting rights by individual parties.

The enactment of § 245 of the Civil Rights Act (1968) extended the enforcement provisions of the two earlier Acts and completed the creation of a new framework of "federally protected activities" legislation. § 245 criminalized interferences with the political and civil rights enshrined in these earlier pieces of federal legislation. In particular, the statute enumerates a range of activities which had been subjected to racist terror throughout the campaigns of the Civil Rights Movement (e.g. "enrolling in or attending a public school or university; participating in any benefit, program, service, or

[85] McAdam (1990).
[86] Quoted in Garrow (1978: 107).

facility provided by a state or local government... serving as a juror; travelling in or using any facility of interstate commerce".[87] It defines interferences with such activities a federal crime, and stipulates a range of penalties (depending, inter alia, on whether firearms or explosive had been used, and the degree of injury to the victim).

C4. The Enactment of "Federally Protected Activities" and the Reconfiguration of Racial Politics

The passing of the "federally protected activities" legislation was enabled by the creation of electoral demands for the enactment of more robust forms of federal intervention in Southern race relations. As we saw earlier, the NAACP's campaign against lynching was constrained by the counterbalancing forces which were operative in the national political arena from the early 1930s onwards. While the two major parties were compelled to appeal to Northern black voters, they also had incentives to appease Southern whites and other racial conservatives. This constellation was changed by about 1963, as Northern white voters became increasingly repelled by Southern racial repressiveness. As the nation became increasingly polarized over the issue of civil rights, it became more difficult to have a foot in both camps. The Kennedy and Johnson administrations faced stronger electoral incentives to invest political capital in promoting civil rights reforms. In doing so, the Democratic Party finally abandoned its post-1930s inclination to oscillate between its liberal and conservative constituencies (i.e. blacks and white liberals, on the one hand, and Southern whites, farmers, and blue collar voters on the other hand). With the passing of the Civil Rights Act (1964), the Voting Rights Act (1965), and the Civil Rights Act (1968), the Democratic Party had finally positioned itself unambiguously aside civil rights reformers. This step had brought to completion this three-decade transitional phase in the evolution of American politics of race and fully established the transition of the black vote from the "party of Lincoln" to the Democratic camp.[88]

In turn, as the Democratic Party became fully invested in supporting civil rights reforms, the Republican Party was impelled to realign its own voting base by means of establishing a stronghold among socially conservative voters. The mobilization of popular opposition to desegregation (and, in later decades, to affirmative action) served as a salient

[87] 18 U.S.C § 245.
[88] Weiss (1983).

instrument while pursuing this realignment. This shift was firstly pronounced in the 1964 presidential elections, in which Republican candidate Barry Goldwater heralded the twofold neoconservative crusade to roll back welfarist and civil rights reforms and to extend 'law and order' policies. As we will see in the next chapter, this "Southern strategy" was to become the lynchpin of the effective realignment of the voting base of the national Republican Party in future decades, and arguably a decisive catalyst of its post-1980 hegemony in national politics. The passing of the "federally protected activities" legislation not only served as a product of this restructuring of American politics of race. It also accelerated and entrenched this process. Thus, it could be argued that, while the short-term implications of the introduction of this framework contributed to the furthering of the racial justice projects, its effects in the long term were double-edged. We will discuss these effects in more detail in **section G** of this chapter as well as in the next chapter (in which I will consider the post-1968 development of "pro-black" criminalization).

D. The Role of Cold War Politics in Enabling and Constraining the Mobilization of Federal "Pro-Black" Criminalization Policy

D1. Cold War and Civil Rights

Apart from electoral considerations and pressure from civil-rights activists, post-War federal administrations had operated in the shadow of another set of incentives for criminalizing racist violence. From the mid 1940s onwards, national policymakers were increasingly obliged to consider the impact of Southern racist brutality on the international image of American democracy. WWII effectively terminated the dominance of the non-interventionist doctrine which had shaped America's foreign policy hitherto. Consequently, the implications of the nation's race relations on its foreign policy became an important dimension of civil rights policymaking. In some measure, Jim Crow already became problematic from a foreign policy perspective already during WWII itself, a war justified as a crusade against the moral indefensibility of European Fascism yet carried out by racially segregated military forces. In an effort to legitimate American involvement in the War, the federal government sought to emphasize the ideological disparities between American democratic values and Nazi illiberal credos. These efforts were responsive to internal pressures, exemplified by a 1942 *New York*

Times editorial which urged the government to ameliorate racial practices in order to avoid "the sinister hypocrisy of fighting abroad for what it is not willing to accept at home".[89]

These challenges of legitimation became more pressing following the advent of the Cold War. From now on, international perceptions of American democracy would be recognized as pivotal for winning the ideological battle with communism and thus for fortifying both national security and the stability of the international order. Although the military and political configurations of the Cold War took different forms in the following decades, the ideological framing of the conflict continued to reflect its early portrayal by President Truman as a struggle between "free peoples" and tyrannical regimes. This mode of framing had diverted the open controversy between the two superpowers from issues concerning the material and geopolitical stakes of their competition over "zones of influence" toward moral questions which emphasized the contrasts between their political ethoses. Within this context of ideological rivalry, the political conditions of African-Americans emerged as the feature of American democracy which was most vulnerable to Communist recriminations.

American racial practices became particularly problematic from a foreign policy perspective because of the critical importance attached to mobilizing the political consciousness of non-white peoples in the newly independent nations which mushroomed in Africa, Asia, and Latin America (where anti-Western sentiments thrived after emancipation from decades of colonial rule).[90] In the early 1950s, the State Department estimated that nearly half of Soviet propaganda highlighted American racist practices.[91] Incidents of white supremacist violence provided critics of American democracy with ample evidence of the double standards of American political ideology. They also lent credence to charges of American Occidental imperialism by means of linking the nation's imposition of Western values abroad with its repression of African descendants at home.

In this section, I will explore the impact of these new pressures of legitimation on the contours of activism and policymaking related to the protection of African-Americans from white supremacist violence.

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[89] Quoted in Dudziak (2000: 24)
[90] Skrentny (1998: 245).
[91] Ibid, ibid.

D2. The Impact of Cold War Imperatives on Black Mobilization in Demand to Criminalize White Supremacist Violence

The impact of the Cold War on domestic American politics both enhanced and constrained the leverage of black activists while prodding the federal government to assume responsibility for the criminalization of Southern racist brutality. On the one hand, public opinion increasingly came to recognize that race discrimination harmed the nation's reputation abroad by providing Communists with an invaluable propaganda weapon. According to a Harris Poll, in 1963, this view was shared by no less than seventy-eight percent of white Americans.[92] Public concerns regarding the damage done by Jim Crow to the nation's international standing served to lend more weight to the Movement's demands to criminalize racist brutality even when numerous other symptoms of Jim Crow were still deemed tolerable. On the other hand, as the apocalyptic undercurrents of Truman's framing of "the struggle between freedom and tyranny" were fomenting the rise of McCarthyism, mainstream political discourses became less inclined to accommodate campaigns which spotlighted the illiberal aspects of American political culture.[93] Although the practice of criticizing liberal welfarist reforms as "Red Plots" or "Communist" had been widely used by conservative politicians from the dawn of the New Deal era, these accusations became increasingly salient (and gave rise to unprecedentedly aggressive forms of political repression) from the late 1940s.[94] McCarthyism both expressed and incited widespread fears of communist influence on American institutions. The Second Red Scare (during which thousands of Americans were accused of being Communists or communist sympathizers) had exposed black activists to both formal and informal persecution insofar as they framed their grievances in terms which challenged the self-image of American democracy.

Within this setting, African-American activists had to consider whether to capitalize on the new political opportunities presented by the governmental need to reconcile American professed political ideals with its actual racial practices. Their dilemma reflected

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[92] Dudziak: (2000: 187).
[93] Fried (1997).
[94] Ibid, 41.

concerns that the utilization of the expressive qualities of criminal law to censure individual manifestations of white supremacy would not necessarily precipitate governmental moves toward addressing the broader economic and political structures which stabilized racial inequality. At the same time, it was clear that the political opportunity structure for mobilizing a radical structural reform of American race policies was impeded as long as McCarthyism repressed the development of progressive campaigns which represented the symbiosis of race and class as the constitutive force of social injustice in America. The conflicting responses taken by black activists in the face of this double bind reflected the profound strategic and ideological disagreements within the black community.[95] On the one hand, integrationist black voices sought to make hay of the opportunities offered by these new pressures of legitimation with which post-War federal administrations had to grapple. For example, in an article published in *The Crisis*, the official magazine of the NAACP in 1951, the Association's executive director Roy Wilkins had stressed that "the Negro wants change in order that he may be brought in line with the American standard...which must be done not only to preserve and strengthen that standard here at home, but to guarantee its potency in the world struggle against dictatorship".[96]

On the other hand, radical black movements sought to utilize the increasing international interest in Southern racist brutality in order to debunk the credibility of American professed leadership of the "struggle between freedom and tyranny". In December 1951, the Civil Rights Congress (CRC), a black organization associated with the Communist Party USA, submitted to the UN Committee on Human Rights a petition accusing the US federal government of "complicity in genocide", on the ground of its persistent failure to act against lynching. The petition included nearly 150 pages of evidence to 153 killings and 344 nonfatal incidents of violence against African-Americans committed in the US between 1945 and 1951. It then argued that the failure of the federal government to bring racist offenders to justice violated its obligations under the UN Convention of the Prevention and Punishment of the Crime of Genocide. Under the Convention, ratifying states pledged to punish any of their citizens involved in the "killing, causing serious bodily or mental harm...with intent to destroy, in whole or in part, a...racial...group". The petition was signed by family members

[95] Haines (1998).
[96] Quoted in Dodziak (2000: 29).

of victims of lynching and by prominent black activists. It explicitly established a linkage between the de facto decriminalization of lynching and broader, ostensibly non-violent, dimensions of American institutional and cultural racism. In one of their opening statements, petitioners declared: "Out of inhuman black ghettoes of American cities, out of the cotton plantation of the South, comes this record of mass slaying on the basis of race, of lives deliberately warped and distorted by the wilful creation of conditions making for premature death, poverty and diseases".[97] The petition concluded with the following statement: "The oppressed Negro citizens of the United States, segregated, discriminated against, and long the target of violence, suffer from genocide as the result of the consistent, conscious, unified policies of every branch of government".[98]

This rhetoric reflected the view of black nationalists that the recourse to supranational forums and institutions was not only strategically effective in intensifying the political pressures on national policymakers. It was also required in order to mobilize cross-national racial solidarities and pan-African political consciousness. In their view, governmental toleration of racist brutality at home was part and parcel of a broader legacy of racial exploitation which had taken a global scale and meaning from its very inception in the Atlantic slave trade.

The establishment in 1945 of the United Nations fell short of providing African-Americans with enforceable legal remedies against their national government. However, it had equipped black activists with access to new communicative vehicles for attracting the interest of the world press and thus appealing to international audiences. This development added a new dimension to the long-standing struggle for bringing American government to tackle the victimization of African-Americans. As in other areas of black activism, although the campaigns mobilized by moderate and radical flanks appear to be in tension, it is arguable that the efforts of black radicals to tarnish the international image of American democracy made policymakers more receptive to the demands made by black integrationists to introduce a new framework of "pro-black" federal criminal legislation.[99] Let us now turn to discussing in more detail the dynamics which impelled federal institutions and policymakers to become more receptive to these campaigns.

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[97] Dudziak (1997: 63).
[98] Civil Rights Congress (1951).
[99] On the interplay between radical and moderate flanks of the Civil Rights Movement, see Haines (1988).

D3. The Impact of Cold War Imperatives on Federal Anti-Racist Criminalization Policies

The increasing international scrutiny of American racial practices impelled the federal administration both to become more supportive of civil rights reforms and to devise new mechanisms for communicating its messages abroad. The pursuit of the latter objective led to the establishment of the United States Information Agency (USIA) in 1953. The USIA was assigned with the task of planning and implementing strategies for responding to international criticisms of US policies. It was also responsible to monitoring and informing policymakers of the impact of domestic political events on the nation's international reputation.[100]

It is important to reiterate that the need to appease international audiences did not fully determine the character of governmental policies, as international pressures of legitimation had to be counterbalanced against other interests that were at stake (in particular, the electoral considerations analyzed earlier). Still, as Mary Dudziak has shown, Cold War imperatives were taken into account throughout the defining moments of the Movement's struggle.[101] In particular, the damage caused to the nation's international standing by international media coverage of Southern brutality was explicitly acknowledged by President Eisenhower in justifying his decision to involve federal troops for resolving the crisis in Little Rock.[102] In his televised speech following the dispatching of federal troops (a speech that was translated to forty-three languages and extensively covered by the international press),[103] Eisenhower stated:

> "At a time when we face grave situations abroad because of the hatred that Communists bear toward a system of government based on human rights, it would be difficult to exaggerate the harm that is being done to the prestige and influence, and indeed to the safety, of our nation and the world. Our enemies are gloating over this incident and using it everywhere to misrepresent our whole nation".[104]

While Eisenhower's speech was primarily aimed at convincing the American public of the justifiability of his decision, his attempt to dissociate American values from Southern

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[100] Dudziak (2000: 142-145).
[101] Dudziak (2000).
[102] Ibid, chapter 4.
[103] Skrentny (1998: 263).
[104] Quoted in Dudziak (2000: 133).

racial brutality were mainly directed to international audiences. In stressing this distinction, Eisenhower adhered to the broader strategy devised by the USIA for tackling international criticism in the aftermath of high-profile incidents of white supremacist terror. This strategy sought to emphasize the extent to which Southern practices deviated from national norms and to justify the toleration of such practices by the federal government as reflecting its reluctance to use force to repress internal conflicts. The film *Nine from Little Rock* that was produced by the USIA, translated into seventeen languages and distributed to ninety-seven countries (before being awarded an Oscar in 1965 for best documentary film), epitomized the propagandist methods used for amplifying this message. The film ascribed the turbulence in Little Rock to the actions of a racist "few who tried to impose their will on the many", and concluded by assuring that "if Little Rock taught us nothing more, it taught us that problems can make us better, much better".[105]

Inasmuch as cinematic portrayals of the events were suitable for recasting the problem as an issue of individual non-compliance with American collective norms, the criminalization of such conduct remained the ideal institutional tool for communicating this message. From the perspective of its functional contribution to accommodating challenges to the legitimacy of a given political order, criminalization provides governments with a framework for reconstructing social problems in a politically convenient way by means of "individualizing" blame for the materialization of social harm.[106] In the context of "pro-minority" criminalization, this re-contextualization serves to eclipse the extent to which state policies themselves are complicit in creating the criminogenic conditions within which such forms of victimization are likely to occur.[107] Accordingly, the "hands off" approach taken by federal authorities throughout the entrenchment of Jim Crow facilitated the crystallization of the cultural and political conditions within which such vigilante resistance to racial desegregation thrived. At the same time that the federal government censured the inhibition of desegregation by white supremacist mobs, it was still ready to tolerate various mechanisms that were erected by Southern authorities for inhibiting desegregation of public schools and other public institutions. The increasing political support for enacting federal "pro-black"

[105] Quoted in Dudziak (2000: 218).
[106] Lacey (1995: 14).
[107] Cf. Norrie (2001: 223).

criminal legislation was a step forward. However, to the extent that this willingness was motivated by the effort to contain the challenges of legitimation provoked by international critics of American government, it relied upon shaky foundations. Like other policy reforms attempted to improve the nation's reputation abroad rather than to actually remove the conditions which structurally exposed African-Americans to social harm, the actual transformative effect of such symbolic steps was intrinsically constrained.

E. The Federalization of Anti-Racist Criminalization Policy as a Vehicle for the Construction of Federal Crime-Control Authority

E1. The Rise of the New Deal Model of Federal Governance

Another structural shift which facilitated the accelerated development of federal anti-racist criminalization policy in the post-War years was associated with the rise of a new (and considerably more ambitious) vision of the role of the national administration in addressing the nation's core social problems. This shift created new pressures of legitimation on the federal government, which was compelled to reconcile the new vision through which it justified the expansion of its powers throughout the New Deal era (1930-1968) with its modes of handling the sectional defiance of federal authority in the South. Because the establishment of the New Deal vision of federal authority was interwoven with the transformation of the jurisprudence of the Supreme Court on the question of the constitutional limits of national legislative and executive powers, one of the major catalysts for the emergence of "federally protected activities" policy was provided by the decline of the constitutional doctrines which had inhibited the development of federal civil rights policy hitherto.

As we saw in the previous chapter, the dominant view which took hold after the collapse of Reconstruction maintained that Congress did not possess constitutional power to regulate racial discrimination by private individuals,[108] and thus that it could not criminalize such conducts.[109] This view remained in force despite the clear failure of Southern states to fulfil their part in the federalist package and to bring racist perpetrators to justice. The constitutional theory which underlay this dominant legal and political view was based on the

[108] *Civil Rights Cases, 109 U.S. 3* (1883).
[109] *United States v. Harris, 106 U.S. 629* (1883).

model of *dual federalism*. According to this model, the American governmental system is comprised of two separate and co-sovereign subsystems (federal and state-level), each of which is supreme within its sphere of operation. Throughout the entrenchment of the New Deal model of government in various domains of public policy, the influence of *dual federalism* was significantly eroded. As a result, it became increasingly difficult to reconcile the de facto decriminalization of white supremacist terror in the South with dominant constitutional theories regarding the responsibilities and powers of the federal administration.

The decline of *dual federalism* was triggered by the proliferation of a new vision of federal governance from 1930s onwards. The New Deal programs introduced a new array of ideas regarding the role of the national administration in regulating the operation of the market economy and in stimulating economic growth and stability.[110] These ideas originally emerged in order to remedy specific deficiencies of the nation's economic system. However, during the following decades (and particularly after WWII), they had gradually begun to be applied to tackle a much broader range of social and economic problems. Eventually, the implementation of New Deal rationalities in new policy domains had eroded the traditional demarcations between the spheres of operation of federal and state governments. In some policy domains, in which the national administration was impelled to cooperate with state and local governments in order to implement New Deal policies, a new model of 'cooperative federalism' was established. Under this model, the national administration had set the parameters of public policy and steered and monitored their execution by state and local governments, mainly through the utilization of fiscal tools.[111] In other policy domains, in which sectionalism appeared to impede the harmonious pursuit of national interests, the relationship between different layers of government resulted in open contests over the legitimacy of federal regulative policies. By and large, these contests were resolved – constitutionally and politically - in favour of a consistent expansion of the legitimate sphere of operation of the national administration.[112] Although Roosevelt's 'court packing' initiative (following the constitutional overturning of the 1935 National Recovery Act) had failed, he was nevertheless successful in utilizing more conventional measures for ensuring greater judicial deference to the principles of New Deal Liberalism (most significantly, the

[110] Brinkley (1989).
[111] Corwin (1950).
[112] Marx (1998: 223).

appointment of eight liberal justices between 1937 and 1941).[113] From the late 1930s onwards, the Supreme Court's constitutional jurisprudence became much more receptive to claims made by the federal government in favour of the expansion of its regulatory reach.[114] This paradigm shift was legitimated through a generous interpretation of Congressional legislative powers under the Commerce Clause and the gradual constriction of the scope of states' rights doctrine (a trend which was reversed only by the Rehnquist Court).[115]

E2. The Emergence of Federal Anti-Racist Criminalization Policy as a Product and Facilitator of the Expansion of Federal Criminal Justice Policymaking Authority

The entrenchment of the New Deal model of national policymaking had altered the character of anti-racist activism and policymaking in two main ways. First, as the national administration accumulated greater institutional capacities and political legitimacy, African-American activists were increasingly inclined to channel their efforts toward demanding federal intervention (rather than to prodding Southern elites to call for the relaxation of racial oppression). Second, in an effort to legitimate the expansion of its involvement in criminal justice policymaking, the national administration was increasingly inclined to use the problem of the abdication of enforcement responsibilities by Southern governments as an illustrative example of the pitfalls of states' rights ideology. Our discussion in **section C** of this chapter already demonstrated the extent to which the Movement prioritized the recourse to federal institutions as the primary path for abolishing Jim Crow. In the remainder of this section, we will therefore focus on the second aspect of this structural shift, namely, the way in which the new pressures of legitimation with which the federal government was faced throughout the expansion of its crime-policymaking authority had created new incentives to establish a new regime of federal "pro-black" criminalization.

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[113] Leuchtenburg (1996).

[114] Placed within the context of the intellectual history of American legal thought, the judicial endorsement of the principles of New Deal liberalism was facilitated by the rise of legal realism in the 1930s. Realists' descriptive analysis of adjudication as a form of policymaking, and their critique of Lochner-style judicial rationalizations of 'laissez faire' ideology, facilitated the emergence of new conceptions of the judiciary's political role. Their theories also inspired a greater commitment to developing progressive-oriented jurisprudence.

[115] *United States v. Lopez*, 514 U.S.549 (1995).

The expansion of the regulatory authority of the national administration was inevitably interwoven with the extension of Congress's criminalizing power. By and large, the cardinal principle of the administration of criminal justice in the American federal system - namely, that primary responsibility for criminalizing criminal conduct lies with state and local institutions - has remained in force. Yet, the power of this principle to exclude the legitimate interest of the federal government in criminal justice policymaking was clearly diminished.[116] Throughout this process, the national government has predominantly resorted to two major modes of justification for legitimating its greater involvement both in directly regulating criminal conduct and in regulating the performances of states governments while executing their enforcement responsibilities. The first mode of justification was based on the identification of national problems which were argued to necessitate regulatory interventions that crossed state borders. The second mode of justification stressed the role of the national administration in establishing national norms which would set minimum standards for the operation of state and local governments. In what follows, we will look at how the establishment of federal jurisdiction over white supremacist violence derived from these two modes of justification and, at the same time, helped the national administration to legitimate the further extension of its powers.

"Pro-Black" Criminalization and the Role of the Federal Government in Tackling Social Problems That Crossed State Borders: The first conventional path for expanding federal crime control authority emphasizes the role of the national government in regulating problems which cross state borders. This rationale resonates with a deep-seated view of the legitimate scope of operation of the federal government, namely, its authority to regulate interstate commerce. However, the institutional conditions which facilitated the heavy reliance on this rationale for legitimating the massive expansion of federal crime control authority were created only throughout the first half of the twentieth century, following the founding in 1908 of the Bureau of Investigation (which in 1932 was renamed the FBI). As Marie Gottschalk has argued, throughout this period, the Bureau's leadership was able to branch out to new areas of governance through fostering media concern of a cluster of social problems which were reconstructed as national

[116] Friedman (1993: 273-276); Merola (1982).

threats that could only be eliminated through large-scale federal crusades.[117] The most prominent of these crusades had reconstructed the political meanings of social problems such as alcohol consumption, ransom kidnapping, and bank robberies throughout the 1920s-30s; juvenile delinquency and sex crimes during the 1940s; and organized crime and Communism throughout the 1950s.[118] Through the mobilization of popular demand for their intervention, federal agencies were able both to establish the legitimacy of their operation in the 'law and order' policy domain and to acquire much greater institutional and budgetary resources.

Understood within this context of its contribution to the construction of the authority of the national government as a crime-control policymaker, the establishment of federal jurisdiction over Southern white supremacist violence signalled a momentous triumph over one of the most salient symbols of the ideology of states' rights. In the early 1960s, when Northern public opinion became increasingly supportive of abolishing the excesses of Jim Crow, the inexorable refusal of Southern states to protect black victims of mob violence had been used to spotlight the acute flaws of traditional states' rights doctrines. These widely-publicized incidents of racial brutality provided an illustration of the abominable way in which states' rights doctrine deprived a sizable class of the American citizens from the most elementary civil rights, including the right to life. By diminishing the legitimacy of states' rights doctrine, this campaign had served to remove an impediment which had inhibited the general development of federal law enforcement for decades.[119]

"Pro-Black" Criminalization and the Role of the Federal Government in Establishing National Standard of Policymaking: The predicament of African-American victims had also served to support the second conventional rationale for legitimating the criminalization authority of the federal government, namely, the establishment of national standards which would oblige state and local governments. Throughout the New Deal era, and particularly in the post-War years, the federal government assumed a much greater responsibility for modernizing the operation of the state and local agencies which addressed

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[117] Gottschalk (2006: 65).
[118] Ibid, 65-76.
[119] Ibid, 62.

the nation's core social problems.[120] While in various domains of public policy this effort could have been effectively pursued through utilization of fiscal incentives, in the domain of criminal justice, the efforts to impose national standards had been much more fervently contested, particularly in the South.

The intensity of Southern resistance to the reformation of regional crime enforcement practices reflected the profound imprints of Reconstruction in the region's collective memory. This resistance was also motivated by the perceived need to retain the suitability of these institutions to keep and reinforce white supremacist norms. Yet, because the post-Reconstruction development of the Southern criminal justice system was profoundly interwoven with the formation of white supremacist political and social institutions,[121] the federal effort to set national standards of crime enforcement had to begin in the South. In the post-War era, it was clear that the performances and institutional capacities of Southern crime control institutions fell conspicuously short of the standards which had been established in the North from the Progressive Era onwards. As Michael Klarman has argued in his analysis of the birth of modern due process jurisprudence, in an effort to legitimate its authority to take a more involved role in superintending states' criminal trial processes (and thus to depart from nearly a century and half of legal precedents), the Supreme Court had incentives to begin revoking the most incontrovertible cases of procedural unfairness.[122] And the starkest instances of unfair practices such as coercion of defendants into confessions,[123] the deprivation of suspects from the right to defence counsel,[124] or discrimination in jury selection,[125] prevailed in the South (and, in particular, in trials in which black defendants were accused of attacking white victims). Likewise, in the field of prisoners' rights, the first steps towards establishing the authority of federal courts to set national standards of imprisonment conditions involved the

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[120] Simon (2004: 309).
[121] As shown in chapter 3 (section C2) of this dissertation.
[122] Klarman (2002: 122).
[123] E.g. in *Moore v. Dempsey,* (261 U.S. 86 (1923)), the Court invalidated a criminal conviction obtained while howling mobs surrounded courthouses, demanding that the defendants be turned over for lynching.
[124] E.g., in *Powell v. Alabama* (287 U.S. 45 (1932)), the Court overturned a conviction where defence council had been appointed in the morning of the trial for a capital crime.
[125] In *Norris v. Alabama* (294 U.S. 587 (1935)), the Court overturned state courts' jurisprudence which had made it nearly impossible to prove that blacks had been intentionally excluded from juries.

invalidation of remnants of plantation-like penal practices such as relying on the whip as a disciplinary instrument or using prisoners as a pool of agricultural labour.[126]

Thus, in the field of criminalization policy as in other domains of crime governance, the underperformance of Southern institutions provided the most obvious deviations from the way in which standards of due process and equal protection had been implemented elsewhere. The reclaiming of federal authority to enforce Southern compliance with these standards was consistent with – and played an instrumental role in the extension of – the broader efforts of the national administration to establish itself as a key policymaker in the field of criminal justice.

In conclusion, in this section, I have shown that the establishment of federal jurisdiction over interferences with civil rights played an instrumental role in building up the political legitimacy and institutional capacities of the national administration in the field of criminal justice policy. One of the major implications of this argument lies in emphasizing the historical contingency (and thus susceptibility to change) of the political conditions which impelled the federal government to become involved in this project of racial egalitarianism. This emphasis is important for grasping the complex long-term consequences of the "federally protected activities" campaign. From the 1970s onwards, the two forces which converged in the early 1960s and stimulated the emergence of this criminalization regime - namely, the effort to establish the authority of the federal government as a pivotal player in criminal justice policy, and the struggle for racial equality - would become increasingly at odds with each other. From now on, the federal government would continue to entrench its dominance in crime control policymaking, but its crusades would be inspired by an entirely different political vision. Much as the framework which justified the post-War expansion of federal crime control authority was embedded within the dominant political ideology of the time (New Deal liberalism), future crusades would come to reflect the ascendancy of neoconservative and neoliberal thinking about the political and social roles of penal institutions. Insofar as this broader mode of thinking would be antagonistic to the egalitarian ideals which were pursued by the Civil Rights Movement, the new configurations of federal involvement in criminal justice policy would often have an adverse impact on the pursuit of these ideals over the next decades.[127] And

[126] Feeley & Rubin (1998: 158).
[127] Stuntz (2008); Miller (2008).

indeed, as I will show in the next chapter, the federalization of criminal justice policy served as a major catalyst of the exacerbation of racial disparities in sentencing and incarceration from the late 1970s onwards. In the context of the current chapter, we can only pinpoint the oblique contribution of the "federally protected activities" campaign to the entrenchment of federal crime control authority as one of the major unintended consequences of this campaign.

F. The Effects of "Federally Protected Activities" Legislation

Based on the analysis of the driving forces which shaped the unfolding of the campaign to criminalize interferences with "federally protected activities", we can now move to consider the effects which this campaign and policy reform engendered. I will explore this question with respect to three major goals which "pro-minority" criminalization is believed to facilitate, namely, a) minimizing the vulnerability to victimization of minority groups; b) contributing to political struggles which seek to diminish social (racial) inequalities; c) eroding the legitimacy of degrading social norms (embodied by the outlawed form of conduct).

F1. The Preventive Effects of the Federalization of Anti-Racist Criminalization Policy

The establishment of the "federally protected activities" criminalization regime between 1964 and 1968 was celebrated as a milestone in American race relations. Yet, in the four decades since its enactment, § 245 of the Civil Right Act of 1968 has only rarely been used by the federal government. During the first decade after its appearance on the statute books, the Justice Department initiated only seventeen prosecutions under § 245 in the eleven ex-Confederacy states.[128] This trend has remained consistent to date. According to a recent report released by the Civil Rights Division of the Justice Department (the agency assigned with primary responsibility for the enforcement of "federally protected activities" legislation), between 2001 and 2006, it initiated only 27 prosecutions (many of which referred to other forms of bigotry-motivated violence, in particular, anti-Muslim).[129]

However, an assessment of the impact of the "federally protected activities" legislation on patterns of white supremacist violence cannot be based solely on data regarding the volume

[128] Belknap (1987:229).
[129] http://www.usdoj.gov/crt/activity.html#crm (last visited, 25/04/08).

of direct enforcement activities. Because this legislation left state governments with the primary responsibility to protect African-Americans through enforcing their own criminal codes, we should also consider the indirect ways in which the threat of federal intervention might have affected the enforcement performances of Southern states. Admittedly, since processes of criminalization bring into play the interactions between multiple social and institutional actors, it is impossible to insulate the direct impact of this legislative reform vis-à-vis various other determinants which might have encouraged Southern states to enhance the penalization of white supremacist terror.[130] In light of these methodological difficulties, my aim in this section is not to establish a conclusive causal link between the introduction of this legislation and the declining recorded rates of white supremacist violence in the South.[131] Nevertheless, I will try to offer a plausible interpretation of its contribution. This interpretation is based on placing this new legislative framework within its broader political context.

The mere introduction of federal jurisdiction over anti-civil rights terror could not have, by itself, forced Southern governments to abandon their long-standing refusal to bring white supremacist perpetrators to justice. However, this legislation was incorporated within a broader array of policies enacted by the federal administration during the New Deal era. The institutionalization of these policies increased the dependence of Southern states and economic elites on federal largesse and on Northern business investments for securing the region's economic stability. The establishment of these policies was initiated in 1938, when the National Emergency Council released its Report on the Economic Conditions of the South. The Report identified the region's economic underdevelopment as a national problem which impeded America's recovery from the Great Depression. The Roosevelt administration endorsed the recommendations, and instituted a series of programs aimed at integrating the South into the nation's industrialized economy.[132] With the institutionalization of these policies throughout the following decades, new disincentives were attached to non-compliance with federal policies.

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[130] As Von Hirsch and Ashworth point out (1998: 44-51), the inability to control for the impact of particular factors form one of the main methodological pitfalls of studies into the deterrent impacts of legislative reforms.
[131] Belknap (1987:237).
[132] Schulman (1991).

As long as the federal government had an ambivalent attitude towards its commitment to protect the civil rights of Southern African-Americans, these economic disincentives remained less concrete. The hypothetical threat of federal intervention had to be counterbalanced against the various domestic factors which impelled Southern politicians to turn a blind eye to (and often to tacitly incite) the persistence of white supremacist terror. With the introduction of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the federal government had communicated a much clearer message regarding its commitment to eradicating these forms of racial discrimination. The passing of this legislation had also signalled to the region's political elites that the veto power of the Southern voting block, as well as the ideological currency of the states' rights doctrine, had fallen from grace, and that their power to inhibit the imposition of federal sanctions could no longer be secured.

This argument is consistent with the thesis presented throughout this study regarding the conditions which facilitate the enforceability of "pro-minority" criminal legislation (and thus improve its preventive effects). In particular, I have focused on two major conditions. First, I emphasized that the extent to which "pro-minority" criminalization reforms are embedded within a broader network of governmental policies aimed at alleviating the structural conditions which cultivate these forms of violence is crucial for facilitating the preventive impact of such legislation. Second, I showed that the compatibility between racial egalitarian reforms and the economic and political interests of hegemonic elites is likely to enhance the enforceability of such legislation.

By tracing the preventive impact of "pro-minority" criminalization policy to its suitability to satisfy these conditions, we can also gain a useful explanatory perspective on why the "federally protected activities" regime had probably failed to reduce the disproportionate vulnerability of African-Americans to other patterns of victimization which were left outside the frame of the Movement's campaigns. As millions of African-Americans moved from the rural South to urban ghettoes throughout the nation, they became increasingly vulnerable to new patterns of victimization. These patterns are rooted in the criminogenic conditions which permeate the disintegrated urban landscape in which a disproportionate bulk of the black population reside, where rates of poverty, unemployment and crime far exceed national

averages.[133] These forms of victimization have been cultivated by mechanisms of racial stratification (associated with the demographic and economic "ghettoization" of the black population)[134] which remained under the radar of the Movement's campaigns.

As our analysis has implied, the Movement's neglect of these patterns of black victimization might have been necessitated by the political opportunity structure within which it had to operate while attempting to mobilize public and political support for abolishing Jim Crow. Yet, although many of the political constraints which the Movement had to overcome in the 1960s are no longer operative, this lack of focus continues to characterize present-day debates on the problem of black victimization. As I will argue in the next chapter, this tendency to marginalize forms of victimization which do not fall into the traditional white supremacist pattern has considerably inhibited the success of contemporary American society in addressing the symbiosis between the overwhelmingly high rates of victimization among African-Americans and other patterns of racial stratification which thrive in de-industrialized urban ghettoes. This failure, I will argue, was shaped by the tendency of the anti-hate crime movement to give emphasis to the cultural (racist-laden) rather than to the socio-economic (class-based) dimensions of interracial violence (as well as to marginalize the significance of intra-racial violence as a symptom of blacks' social exclusion). To the extent that the trajectory of the hate crime campaign has been constrained by the priorities set by the Civil Rights Movement (even if such priorities were strategically necessitated by the circumstances which prevailed at the time), the Movement's neglect of these problems carried some long-term adverse effects on the future development of "pro-black" criminalization policymaking. This dynamic of path-dependence makes our analysis of the historical contingencies which shaped the Movement's mode of framing the problem of black victimization highly relevant for our understanding of contemporary challenges in this field.

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[133] Sampson and Wilson (1995).
[134] Wacquant (2001: 101-103).

F2. The Political and Cultural Effects of the "Federally Protected Activities" Campaign

The political consequences of the "federally protected activities" campaign exemplify the interplay between two contradictory effects which successful campaigns of "pro-minority" criminalization are likely to engender. This is the dialectic between political recognition and political legitimation. The passing of such legislation serves as a salient medium through which the State recognizes the principled entitlement of members of a marginalized group to equal enjoyment of citizenship rights. At the same time, it works to induce public belief in the fairness, impartiality, and effectiveness of State institutions which are heavily invested in stabilizing the marginalization of that group.

As demonstrated throughout this chapter, the campaign to criminalize interferences with "federally protected activities" served as a salient site in which the concrete terms of African-Americans' formal status as citizens were negotiated and articulated. While the leaders of the Civil Rights Movement certainly attached intrinsic importance to the introduction of firmer penal measures, the focus on this particular aspect of the collective experiences of African-Americans was also motivated by strategic purposes. The inexorable refusal of Southern states to bring white supremacist perpetrators to justice provided a dismaying illustration of one the gravest forms of exclusion built into the American political system. The persistent failure of the national administration to compel Southern states to deliver this elementary function of modern government exemplified the acute gaps between the professed values of American democracy and the actual governmental and social practices which Southern blacks had to endure.

The Movement's effective recourse to the 'victimization frame' made a remarkable contribution to its efforts to bring Northern public opinion to support the abolition of Jim Crow. At the same time, the salience of the problem of white supremacist violence within the Movement's agenda provided politicians with a convenient way of responding to the protest. By introducing a new framework for penalizing the most extreme manifestations of white supremacy, national politicians were able to present themselves as responsive to the Movement's demands for reform while circumventing the more controversial issues which the struggle for racial equality sought to address.

The Civil Rights Movement gave emphasis to the pursuit of two immediate goals. The first goal was to dismantle the oppressive caste system which prevailed in the South. The second was to re-establish the constitutional obligation of the national administration to guarantee African-Americans' civil rights. However, because racist beliefs and racist habitus have permeated numerous aspects of American governmental and social systems,[135] the transformative potential latent in the Movement's crusade was much more far-reaching. The depth of the challenge posed by the Movement was explicitly stated even by the preeminent exponent of racial integration, Martin Luther King. In a speech in 1965, he declared:

> "The black revolution is much more than a struggle for the rights of the Negroes. It is forcing America to face all its interrelated flaws – racism, poverty, militarism, and materialism. It is exposing evils that are rooted deeply in the whole structure of our society...and suggests that radical reconstruction of society is the real issue to be faced".[136]

In retrospect, it is clear that while the Movement was able to accomplish its two immediate goals, these achievements eradicated none of the four structural flaws identified by King. The civil rights legislation of the mid 1960s opened new opportunities for middle and upper class African-Americans. It also provided black movements and politicians who have worked within the established frameworks of American electoral and legal systems with new opportunities for initiating policy reforms. Nevertheless, this legislation did not directly target the root causes of the socioeconomic marginalization of the black population (particularly in the North). Although these legislative reforms were indeed followed by a more vigorous governmental effort to address these deeper problems (the Great Society project), they ultimately failed to cement a sustainable public and political commitment to the pursuit of racial inequality. The historical dynamics which led to the collapse of the Great Society project will be discussed in detail in the next chapter.[137] For the moment, it can be observed that the post-1968 crisis of American racial egalitarianism was rooted in the tendency to overstate the suitability of the substantial yet incomplete reforms initiated by the Movement to provide a sustainable solution to the wide range of social pathologies which America's racial legacy had brought about.[138] With the rise of neoliberal policies in the economic

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[135] King and Smith (2008: 80).
[136] Quoted in Hall (2005: 1233).
[137] See discussion in chapter 5 (section C1.1) of this dissertation.
[138] Lieberman (2008: 225).

sphere and neoconservative policies in the cultural sphere from 1980 onwards, these pervasive patterns of occupational marginalization and residential segregation (which were particularly widespread in the North) would block the further integration of African-Americans into the nation's political and economic fabrics. However, the ability of racial reformers to mobilize popular commitment to eradicating these patterns would be impeded by the widespread belief in the suitability of the post-Jim Crow American political system to provide African-Americans with adequate opportunities for economic and political integration.

Our analysis has demonstrated that the Movement's "federally protected activities" campaign had effectively boosted Northern support for abolishing Jim Crow. Yet it could also be argued that the agenda within which this campaign was incorporated was unsuitable to forge political commitment to the radical reform which was envisioned by King as the desirable end result of the Movement's crusade. Because this strategy focused on spotlighting the most brutish aspects of the Southern caste system and on presenting them as embodying the character of American racism, the Movement's campaigns might have diverted the nation's attention from the less brutal yet pervasive patterns of discrimination which prevailed in the North. As a result, these campaigns failed to cement the commitment of Northern public opinion to eradicating the distinct mechanisms of racial stratification which, by that time, were fully entrenched in Northern economy and society. This failure found expression in the fact that during 1964, the very same year in which the sweeping Civil Rights Act passed Congress with overwhelming support from Northern public opinion, fair housing and school integration ordinances were being rejected in countless Northern locales.[139] The enormous emphasis given to Southern violence (in both its legal and extralegal forms) truly represented the South's significance as the cradle of American racism. However, this emphasis might have been ill-equipped to tackle the more demanding task of mobilizing commitment to a structural reform of American bi-regional system of racial stratification.

The clash of expectations which erupted by the late 1960s exposed the fragility of the forms of interracial solidarity which the strategic focus on the Southern scene was able to induce. As Malcolm Feeley puts it, the "beneficiaries" of civil rights legislation "did not express gratitude, as their newfound equality of opportunity did not translate into substantial substantive gains, and the benefactors, the silent majority, felt unappreciated for their

[139] Klarman (1994: 144).

efforts".[140] Although African-Americans in the North were not subjected to formal discrimination, they clearly came to identify themselves as governed by a systemic regime of race-based marginalization. In particular, this regime was suffused with pervasive unemployment and underemployment, inadequate housing and education, and police brutality. Their profound disappointment in the face of federal unwillingness to tackle these distinct structures and mechanisms of social marginalization radicalized Northern blacks' racial consciousness. Riots firstly flared up in New York in 1964, only eighteen days after President Johnson signed the Civil Rights Act, "as if to signal that such legislative redress was insufficient to meet Northern expectations and needs".[141] Between 1964 and 1969, more than four hundred racial riots erupted throughout the nation.[142] The riots reflected the refusal of a new generation of Northern blacks to adhere to the Movement's preference to operate within the bounds of American ideological and institutional frameworks. In turn, the riots facilitated the triumph of a new conservative agenda, which combined an appeal to Southerners' racial anxieties ("the Southern strategy") with a promise to restore law and order in American cities.

The culmination of the "federally protected activities" campaign transpired in the very threshold between these two periods. As such, it symbolizes the crossroad which black activists faced in this particular historical moment. On the one hand, "federally protected activities" can be understood as the climax of a long, adamant, and highly impeded campaign to bring American society to recognize the entitlement of African-Americans "to be protected in the ordinary modes by which other men's rights are protected" (as put by Justice Arlen in his dissent in the *Civil Rights Cases*).[143] On the other hand, it heralded a new era of victim-centred rights mobilization. As I will show in the next chapter, the new policy frameworks which would come to dominate this new era are ill-suited to advance the integrationist goals which "federally protected activities" legislation attempted to promote. Within this context, this legislation symbolized the twilight of the egalitarian opportunities made possible by the short-lived convergence of racial justice and social justice in the mid 1960s.

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[140] Feeley (2003: 122).
[141] Marx (1998: 238).
[142] Ibid, ibid.
[143] Supra note 1.

Chapter 5:

Re-Penalizing "Hate Crime", De-Contextualizing Racial Inequality: The Development of "Pro-Black" Criminalization Policy, 1968-2008

> *It is a widespread but fatal trap – precisely, a trap of 'liberal opinion' – to split analysis from action, and to assign the first to the instance of the 'long term', which never comes, and reserve only the second to 'what is practical and realistic in the short term'...So if someone says to us: 'Yes, but given the present conditions, what are we to do now?' we can only reply, 'Do something about the 'present conditions'.*
>
> *Stuart Hall, Policing the Crisis*[1]

A. Introduction

In the early 1980s, a novel, and unprecedentedly popular, model of "pro-black" criminal legislation had emerged. In 1981, the Anti Defamation League (ADL) began to lobby for the introduction of a new legislative model as part of its campaign against anti-Semitic violence.[2] This new model coined the term "hate crime" for labeling criminal offences motivated by bias, bigotry or prejudice toward the victim. The main innovation of this new legislative model lay in the idea of penalty enhancement. It required the judge to enhance the penalty for a criminal act if it was proven that the offender targeted his victim because of bias toward the group to which she belongs. The ADL hate crime statute model covered not only anti-Semitic violence, but also violence perpetrated on the ground of the victim's race, colour, and national origin. Over the next decade, this model was adopted by legislatures across the nation. To date, 47 states have adopted at least one piece of hate crime legislation, 45 of which have used the penalty enhancement formula. Congress enacted a series of penalty

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[1] Hall (1978: ix-x).
[2] ADL Approach to Hate Crime Legislation (http://www.adl.org/99hatecrime/penalty.asp.).

enhancement hate crime laws applying to federal offences.[3] It also passed the Hate Crime Statistics Act (1990), which required the Attorney General to compile and publish annual surveys on recorded rates of "hate crime".[4] From the outset, racist-motivated victimization of African-Americans was recognized by all states as well as by Congress as a ground for penalty enhancement. Over the years, hate crime statutes have come to encompass various other categories of victims, including those targeted on ground of their sexual orientation, gender or disability.[5] While hate crime laws are not exclusively devoted to penalizing racist violence, they have come to redefine the way in which the age-old problem of black victimization is being understood and the way in which it is tackled by the criminal justice system.

This chapter addresses two historical questions. First, why did this new model of "pro-black" criminalization emerge in the early 1980s? Second, what are the preventive, political and cultural effects which hate crime laws have produced? As explained in the introductory chapter of this dissertation, while grappling with these questions, I take issue with three conventional theses developed by the existing literature on the origins and consequences of hate crime laws. The first thesis suggests that hate crime laws were introduced in order to tackle the upsurge of bigotry-motivated violence in the early 1980s.[6] The second thesis suggests that hate crime laws were introduced in order to symbolize progressive changes in racial attitudes.[7] These changes, it is argued, led American society to perceive age-old racist practices in a new, and more critical, light. Hate crime laws were introduced in order to express the community's sense of moral condemnation of such forms of conduct. The third thesis contends that hate crime laws emerged because of the growth of "new social

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[3] Hate Crime Sentencing Enhancement Act (Pub. L. § 103-322); Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act (H.R. 2647).

[4] Throughout this chapter, I will use the term "hate crime" (with inverted commas) when referring to the conducts which are covered by this criminal category. I will not use quotation marks when referring to the laws which criminalize such conducts or to the name of the movement which mobilized such legislation (viz., when referring to hate crime legislation or the anti-hate crime movement). I use this distinction in order highlight the différance between the signified object (i.e. the activities that are labelled by this criminal category) and the signifying practices (both discursive and institutional) through which the dominant meanings of the concept "hate crime" are being constructed. This distinction is important in order to steer clear of assuming that there is a fixed essence that unite the broad (and, as I will argue, highly indeterminate) ambit of conducts that are policed, investigated, prosecuted and punished under hate crime laws.

[5] Jenness (2001: 304).

[6] See my discussion and critique of this thesis, pp. 11-13 of chapter 1. For an influential statement of this thesis, see: Levin and McDevit (1993).

[7] See my discussion and critique of the "enlightenment of racial attitudes" thesis, pp. 13-15 of chapter 1. For an influential statement of this thesis, see: Kahan (1998).

movements" and their success in effectively politicizing the issue of "hate crime" and impelling legislatures to endorse a new penal response (the distinctiveness of this thesis is that it neither affirms nor denies the claims made by the former two theses; instead, it focuses on the techniques of social construction which enabled social movements to induce public belief in the accuracy of these claims).[8]

In chapter 1 of this dissertation, I presented a cluster of methodological and substantive challenges to the explanatory power of these three conventional theses.[9] I will refrain from reiterating the grounds of this critique here. It is important to emphasize, however, that one of the underlying motivations of my analysis is to challenge the Whiggish implications of these three theses. The Whiggish implications of the first thesis lie in the claim that, with the removal of particular institutional arrangements which produce racially disparate impacts (e.g. indeterminate sentencing), the criminal justice system will be better equipped to, and thus more capable of, realizing the ideal of equal protection. The second thesis (focusing on the putative "enlightenment of racial attitudes") is informed by a quintessentially Whiggish interpretation of American racial history.[10] Echoing a long tradition of conceptualizing criminal law as a communicative vehicle which expresses the community's shared sense of moral disapproval,[11] this argument portrays hate crime laws as mirroring the increasing willingness of American society to tackle symptoms of its racist culture. However, as argued in the first chapter, this thesis cannot explain how, at the very same moment in which American society became increasingly disturbed by this particular symptom of racial inequality (reaffirmation of degrading racial norms by individual bigots), it turned a blind eye to the exacerbation of racial disparities in various other contexts of public policy. If indeed an historic "enlightenment of racial norms" took hold in the 1980, why did these egalitarian sentiments fail to spur firmer political and grassroots opposition to the staggering increase in the number of African-Americans behind bars or below the poverty line? As for the third conventional interpretation (the "social movements/social problems"

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[8] See my discussion and critique of the "social movements/social problems" thesis, pp. 15-17. The leading exponent of this approach has been Valerie Jenness in a series of influential works, including: Broad and Jenness (1997); Jenness (2001); Jenness and Grattet (2002).

[9] See pp. 11-17 of the first chapter.

[10] Cf. Klinker and Smith (1999: 3).

[11] This tradition harks back to Durkheim (1984)[1893]; for recent developments in communicative/expressivist theories of criminal law, see, e.g. Duff (1996); Feinberg (1994); Kahan (1996).

thesis), I have argued that, because of its tendency to overemphasize the role of social action vis-à-vis social structure in shaping the forms and outcomes of legal mobilization, it failed to explore the possibility that the "success" of the anti-hate crime movement was enabled by broader structural conditions which, ultimately, work to inhibit rather than to facilitate the mobilization of egalitarian social change.

In this chapter, I develop a distinct thesis for interpreting the origins and effects of hate crime laws. I will argue that the introduction of this new legal framework was enabled by a broader paradigm shift which came to pass in American politics. The model of New Deal liberalism, which dominated American politics in the post-War decades, and within which preexisting policy frameworks for tackling the problem of black victimization were embedded, was dismantled.[12] One of the main political currents which grew out of the crisis of New Deal liberalism was the increasing salience of "governing through crime" as a frame through which social movements and legislatures represent and act upon social problems.[13] These shifts made room for the mushrooming of single-issue advocacy organizations mobilizing around the problem of "hate crime" at the national and state levels. They also provided legislatures with new electoral incentives to endorse such campaigns. Capitalizing on the salience of victims' rights campaigns in post-1980 American politics, these movements were able to attract unprecedented media and political attention to harmful experiences which members of minority groups are often subjected to and that had been neglected hitherto. The problem of victimization became an increasingly focal and distinctive symbol of social inequality. Accordingly, the willingness of legislatures to adopt firm penal responses to these specific patterns of victimization became an increasingly prominent litmus test for their commitment to ameliorating social inequality. In particular, the model of determinate sentencing reform, which emerged as a popular locus of bipartisan "race-to-the-top" electoral competition, provided a platform for the designation of new policy responses to the age-old problem of unequal protection of minority victims (thus the focus on penalty enhancement). Eventually, I will argue, these criminalization campaigns came to overshadow alternative forms of activism and policymaking which could have been more successful both in generating effective crime-preventive responses and in

[12] Brinkley (1989).
[13] Simon (2007a); (2000).

increasing public awareness of the symbiosis between current patterns of black victimization and broader structures of racial inequality in contemporary American society. Hate crime legislation has also legitimated the expansion of enforcement powers of criminal justice institutions (particularly, of prosecutors and the police) in ways which compromise (rather than promote) the declared egalitarian values emphasized by this campaign.

My interpretation of the effects of hate crime laws is premised on a broader argument about the nature of black victimization as a distinct symptom of social inequality. Like other patterns of racial inequality, the problem of black victimization is constituted by both cultural and socio-economic mechanisms.[14] It therefore requires forms of policy redress which would integrate both elements of symbolic recognition and mechanisms which can alleviate the socio-economic conditions breeding these forms of violence.[15] I will argue that the anti-hate crime campaign has failed to mobilize policy solutions capable of achieving such integration. This failure is noticeable both in the way in which dominant discourses of "hate crime" frame the political meanings of current patterns of black victimization (i.e. in their functioning as an expressive tool) and in the manner in which these policies structure the enforcement practices through which the criminal justice system administers cases of interracial violence (i.e. in their operation as preventive instruments). The root causes of this failure, I would argue, lie in the very same conditions which enabled hate crime laws to emerge, i.e. their being embedded within the new forms of electoral mobilization which dominate the post-1980 American politics of crime.

Section **B** of this chapter introduces the main features of hate crime legislation and pinpoints the distinctiveness of this new model of "pro-black" criminalization policy vis-à-vis the legal regime which it came to replace. **Section C** explores the relevant structural transformations which took shape in American politics between the mid 1960s and the early 1980s (the historical moment in which hate crime laws emerged). Drawing on sociological and political-science literature examining the historical dynamics which led to the collapse of New Deal liberalism and the rise of

[14] On the interplay between culture and economic forces in shaping the collective conditions of African-Americans, see: Wilson (2009: chapter 1).
[15] Cf. Fraser (2000).

new forms of political mobilization around the problem of crime,[16] I focus on the way in which these structural transformations affected the policy frameworks through which the problem of black victimization has been tackled in late-modern American democracy. I show that, by the mid 1960s, American politics provided conditions which were conducive to the development of two policy frameworks which could have addressed the interlocking socio-economic and cultural aspects of the problem of black victimization more successfully than sentencing enhancement reforms. These were: the welfarist and anti-poverty mechanisms integrated into the Great Society project; and the judicial and administrative mechanisms introduced in order to extend due process rights to African-Americans. I analyze the driving forces which led to the collapse of these two policy frameworks and delineate the character of the new policy frameworks that came to replace them (and within which hate crime policies are embedded). This analysis provides the historical groundwork for examining whether these policy frameworks are suitable to address the distinctive dimensions of current patterns of black victimization. This examination will be conducted in the following sections.

Section D analyzes the strategies of mobilization and the collective action frames employed by the anti-hate crime movement, and traces the institutional and organizational conditions which brought them about. In particular, I consider how the fact that the anti-hate crime campaign has been mobilized by single-issue organizations operating at the state and national levels shaped the outcomes of this campaign. The discussion integrates political science perspectives on the inherent limitations of "pro-victim" single-issue organizations (operating at the state and national levels) in generating effective policy responses, with sociological and historical perspectives on the transformative processes which led to the increasing prominence of single-issue organizations in shaping the agenda of racial egalitarian reform.

Section E explores how dominant representations of "hate crime" in legal and political discourses have reconstructed the meaning of the problem of black victimization. I pinpoint the political assumptions which underlie the way in which these discourses represent the causes of and solution to existing patterns of black

[16] Most notably, the works of Beckett (1997); Garland (2001a); Gottschalk (2006); Lacey (2008) and Simon (2007a).

victimization. I then consider the nexuses between these forms of representation and dominant modes of defining the responsibilities of the State in neoliberal ideology. I show that dominant modes of representing "hate crime" have obfuscated the relationship between patterns of black victimization and related patterns of racially skewed socio-economic marginalization.

Section F depicts and assesses the implications of hate crime policies on the way in which cases of interracial victimization of African-Americans are being administered by the criminal justice system. In particular, I consider whether these policies have been successful in minimizing the risks of discriminatory exercise of discretion by crime enforcement agents, and whether they are suitable to enhance the deterrent effect upon would-be racist offenders. Drawing on studies of the role played by determinate sentencing reforms in structuring the measure of control of different enforcement agents on the outcomes of the criminalization process, I show that the focus of hate crime policies on constraining judicial discretion was misplaced. This focus had provided prosecutors and the police with new powers that are likely to be disproportionately employed against suspects belonging to racial and ethnic minorities. Drawing on empirical studies on the deterrent effect of determinate sentencing reforms, I challenge the suitability of penalty enhancement laws to produce a significantly greater deterrent effect vis-à-vis that produced by the original criminal offence.

B. Hate Crime Legislation: Its Forms and Distinctiveness Vis-à-vis Preexisting Frameworks for Penalizing Racist Violence

The main innovation of hate crime laws as a model of criminalizing racist violence lies in the idea of penalty enhancement. [17] 45 out of 47 states which instituted hate crime laws adhered

[17] One introductory clarification on the focus of my inquiry is in order. The discussion in this chapter focuses on penalty enhancement hate crime legislation, rather than on concurrent campaigns which had addressed the problem of hateful conduct but did not yield criminalization reforms. As defined in the introductory chapter of this dissertation, the concept of criminalization encompasses the entire range of practices through which societies identify and respond to "crime". Penalty enhancement hate crime laws have transformed the processes through which the scope of criminal responsibility and penal liability for the perpetration of "racist conduct" is defined in the US. Simultaneously with the campaign for enacting penalty enhancement reforms, a salient campaign against hate speech had also gained ground. However, the anti-hate speech movement did not focus on mobilizing criminalization reforms, but rather on 'softer' forms of disciplinary regulation or tort remedies (e.g. speech codes in campuses or tort claims for the creation of hostile working environment in the workplace) (see: Gould (2005: chapter 3)). Among other things, the anti-hate speech campaign was channeled toward non-penal forms

to the sentencing enhancement formula.[18] This legislative formula provides that an offender's penalty might or must be enhanced if he intentionally selected his victim because of her actual or perceived racial identity. The sentencing enhancement process was designed differently by different states. However, three models are particularly common.[19] Under the first model, proof of a biased motive as an element of a criminal offence automatically adds a specific number of years to the length of the sentence for the underlying offence. For example, Alabama's hate crime statute stipulates a mandatory enhancement of an additional fifteen years when a felony is proven to be motivated by the "victim's actual or perceived race, colour, religion, national origin, ethnicity, or physical or mental disability".[20] Under the second model, which is in force in California, a conviction under a hate crime statute simultaneously increases both the minimum and the maximum sentences for the underlying offence.[21] Under the third model, the maximum penalty might be doubled[22] or tripled[23] if the underlying offence was motivated by racial bias. In all three variations, hate crime laws are shaped in accordance with a broader model of criminal legislation which became immensely popular in the early 1980s: determinate sentencing reform. As I will show in this chapter, the embedding of this new model of "pro-black" criminalization within the broader structure of determinate sentencing policies generates many of the institutional pitfalls which hinder the realization of the egalitarian values which such legislation symbolizes.

In order to introduce the distinctive features of hate crime laws, let us consider how they differ from the legal framework which governed the problem of black victimization prior to their enactment.

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of redress because of its explicit emphasis on the problem of racist *expression*, rather than on racist *acts*. Because the distinction between speech and acts is deeply rooted in American First Amendment jurisprudence, this focus posed insuperable constraints on the development of a campaign for criminal regulation of hate speech. This has become apparent in 1992, when the Supreme Court struck down a municipal ordinance that outlawed cross burning (and other forms of expressive racist speech) on the ground of its selective targeting of particular forms of speech (See *R.A.V. v. City of St. Paul* 505 U.S. 377 (1992)). The decision of the Court in the following year to uphold the constitutionality of penalty enhancement hate crime laws further established the distinction between these two forms of anti-racist policymaking (see *Wisconsin v. Mitchell* 508 U.S. 47 (1993)). The focus of this chapter on penalty enhancement hate crimes is consistent with the conventional separation between these two fields of regulation by the major sociological studies on hate crime. See, e.g.: Jacobs and Potter (1998: 6-7).

[18] ADL Approach to Hate Crime Legislation, at the official website of the Anti Defamation League (http://www.adl.org/99hatecrime/penalty.asp).

[19] Goldberger (2004: 453-455);

[20] Ala. Code § 13A-5-13 (1994).

[21] Cal. Penal Code § 190(a) (West 1999).

[22] See, e.g. Ohio's hate crime statute: Ohio Rev. Code Ann. § 2929.14(A) (Anderson 2003).

[23] See, e.g. Florida's hate crime statute: Fla. Stat. Ann. §§ 775.085, 775.082 (West 2002).

Before the enactment of hate crime laws, the problem of interracial victimization of African-Americans was primarily tackled through the enforcement of generic criminal laws by individual states (e.g. prohibiting homicide, arson or vandalism). From 1968 onwards, particular forms of victimizing African-Americans (i.e. those amounting to interferences with "federally protected activities") were also subjected to federal prosecution in cases in which state authorities eschewed pressing charges against the perpetrator. However, as we saw in the previous chapter, this mechanism remained largely unused by the federal government. As Sara Beale has noted, "on average, there have been four to six prosecutions per year under § 245, and that section has never generated more than ten cases per year".[24] In addition, these federal statutes covered a much narrower ambit of conducts vis-à-vis hate crime statutes. This is due to a threefold distinction between the formulation of "federally protected activities" legislation and that of hate crime laws. Each of these distinctions is emblematic of broader transformations which came to pass in America's governmental structures and political culture from the mid-1960s to the mid-1980s.

The first distinction pertains to the way in which each of these criminalization regimes framed the *mens rea* requirement of the offence. In contrast with hate crime laws, "federally protected activities" legislation did not refer to the perpetrator's hateful motivation per se, but rather to his intent to prevent the victim from exercising her political or civil rights because of her racial identity.[25] As we saw in the previous chapter, the list of activities enumerated under this federal statute included specific forms of civic participation from which blacks had long been excluded by means of intimidation and terror (e.g. voting, enrolment in public schools or jury service). Prima facie, this expansion of the *mens rea* requirement might be interpreted as evidence of greater social recognition of the wrongfulness and harmfulness embedded within *all* forms of racist conduct, not only those which directly impede the exercise of political and civil rights.

However, as I will argue in this chapter, a closer look at the full range of transformations which took place in American politics and society in the wake of the "civil rights revolution" puts the explanatory power of this interpretation in question. As will be shown, in various other contexts of public policy (and crime policy in particular), we have actually witnessed a retreat of legislatures and of the judiciary from attempting to restrain

[24] Beale (2000: 1238).
[25] Jacobs & Potter (1998: 38).

forms of state action which generated large-scale injurious effects on African-Americans. For the moment, I will simply highlight an important distinction between these two generations of "pro-black" criminal lawmaking. Whereas the "federally protected activities" provisions were incorporated within a comprehensive framework of civil rights legislation, the introduction of hate crime laws did not constitute a part of a broader legal reform which extended African-Americans' civil and political rights beyond the penal sphere. As we saw in the previous chapter, the "federally protected activities" legislation emerged in order to provide the national administration with enforcement tools for guaranteeing the political and civic rights enshrined in two omnibus pieces of civil rights legislation, the Civil Rights Act of 1964 and the Voting Rights Act of 1965. These criminal provisions symbolized the political commitment of the federal administration to guarantee African-Americans' equal rights in various areas of governmental responsibility (including, education, housing and voting). By contrast, I would argue, it is difficult to locate hate crime laws as an integral component within a broader array of policy measures through which policymakers seek to alleviate prevailing structures and symptoms of racial inequality in contemporary American society. Furthermore, an inquiry into the conditions of existence of this legislation reveals that it draws on – and in turn serves to extend - broader legislative and ideological crusades which exacerbate racial polarization.

A second important distinction between the "federally protected activities" model and the hate crime model refers to the specific problem of enforcement which each of these policies aimed to remedy. The main purpose of "federally protected activities" legislation was to establish a permanent mechanism of federal intervention in cases in which patterns of institutional racism at the state and local levels deprived African-American victims from their rights to equal protection. As shown in the previous chapter, this legislation was embedded within a much broader array of doctrinal, statutory and administrative measures through which the federal administration sought to incentivize Southern authorities to ameliorate patterns of institutional racism.[26] By contrast, hate crime laws do not establish a complementary mechanism for tackling cases of de facto de-criminalization as a result of institutional racism. Rather, they apply to conducts which are already prosecuted under generic criminal laws, and seek to provide prosecutors and judges with severer penal sanctions so as to reflect the aggravated gravity of bigotry-motivated perpetration of such conducts.

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[26] See discussion in chapter 4, section F1.

In this chapter, I will consider whether the enhancement of penalties for bigotry-motivated offences was indeed necessitated in order to remedy systemic enforcement deficiencies. I will argue that, in an era of over-criminalization[27] and the standardization of increasingly harsh penal responses to both violent and non-violent crime,[28] it is doubtful whether this reform was responsive either to a problem of insufficient coverage of substantive criminal codes or to insufficient penalization of such offences. Moreover, I will show that, when placed within this broader terrain of criminal justice policy in an era of over-criminalization and excessive penalization, it is arguable that hate crime laws expose African-American (as well as Latino-Americans) suspects and defendants to greater risks of disproportionate sentencing. These risks are increased because of the tendency of determinate sentencing reforms to provide prosecutors with decisive influence on sentencing outcomes, a pattern which serves as one of the main driving forces of the system's tendency to produce disparate results across class and racial lines.[29]

The third distinction between these two "pro-black" criminalization regimes is that, whereas "federally protected activities" legislation was predominantly concerned with the problem of racism, hate crime laws are aimed at mediating a broad variety of social antagonisms. For example, in the District of Columbia, hate crime laws provide for enhanced punishment if the perpetrator selected his victim on the ground of her personal appearance, marital status, education, or army service.[30] The tendency to expand the scope and range of protected categories of victims raises a cluster of doctrinal and political difficulties.[31] In the context of this study, our main concern is that the juxtaposition of the problem of black victimization with such disputable forms of identity-based victimization leads to the eclipsing of the distinctive dimensions of *race* as a unique source of social and political inequality in American society, past and present. In particular, it will be shown that legal and political discourses of hate crime work to obfuscate the socio-economic forces which shape current patterns of black victimization.

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[27] Stuntz (2001).
[28] Whitman (2004: chapter 2).
[29] Davis (2007).
[30] Jenness (2001: 301-306).
[31] Jacobs and Potter (1998: 16-21).

C. The Structural Transformation of the Political Opportunity Structure for the Mobilization of "Pro-Black" Criminalization Policy

In order to understand why, in the early 1980s, American society established a new regime for penalizing racist violence, we have to understand how structural political and social changes which crystallized during this period enabled and constrained the forms of mobilization available to "pro-black" activists. In this section, I will analyze the structural transformations which took place in American politics between the mid 1960s and the 1980s, the historical moment in which hate crime laws emerged.

C1. The Demise of Non-Punitive Frameworks for Tackling the Problem of Black Victimization

C1.1. The Crisis of Welfarism and the Dismantling of Policy Frameworks for Tackling the Socio-Economic Dimensions of Black Victimization

As we saw in the previous chapter, between 1930 and 1968, the dominant ideological and institutional structures of America's governmental system had been radically transformed throughout the entrenchment of the New Deal model of government. This model grew out of the disillusionment (which became widespread during the Great Depression) with the suitability of nineteenth century laissez-fare ideology to manage the crisis tendency of modern capitalism and thus to secure political and social stability. Gradually, the principle that underpinned the 1930s New Deal programs – namely, that a systematic reliance on the steering and regulatory tools of government (and, particularly, of the federal government) was necessary for tackling the nation's core social problems – was adopted in one area of public policy after another.[32] Within the New Deal model government, welfare policies and institutions were perceived as pivotal to governmental efforts to ameliorate socio-economic inequalities and to alleviate levels of crime and social disintegration. The legitimacy of this political vision was consolidated throughout the post-War decades amid sustained economic growth, improved standards of living, and high levels of employment buttressed by Keynesian demand management.

[32] Brinkly (1989).

Although the trajectory of New Deal liberalism was not always consistent with the racial egalitarian cause,[33] in the early 1960s, it came to converge with civil rights reformism. This convergence, I argued in the previous chapter, was brought about by the interlocking operation of a set of historical pressures, including Cold War dictates, the thriving of black insurgency, and the dynamics of electoral competition between the two major parties. Operating in tandem, these pressures impelled the Johnson administration to invest an unprecedented amount of political capital in committing itself to both anti-poverty and racial justice projects. This commitment was symbolized by the introduction in 1965 of the Great Society programs, which sought to alleviate the symbiotic problems of racial inequality, urban poverty and urban crime.

By positioning the triangle of poverty, crime and racial inequality in the forefront of its domestic policy agenda, and asserting that these problems could be diminished through extending federal spending on welfare and perfecting the strategies of governmental intervention, the Great Society programs epitomized the most ambitious formulation of the 'social engineering' elements of New Deal governance.[34] Inevitably, this ambitious undertaking also rendered the New Deal model more vulnerable, in the event of failure to meet its targets, to criticism of the structural incompetency of welfarist-centred crime policy to deliver greater security and social stability.

The decline of public faith in the efficacy of the New Deal model began to be noticeable in the 1970s. As David Garland depicts the decade's public mood:

> "It turned out that the institutions designed to meet the population's need for housing, or health care, or education, or social work or income support had a tendency to discover more and more unmet needs, so that the problem appeared to become larger rather than smaller. So although budgets were regularly increased...welfare problems did not get 'solved': instead they became an

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[33] In particular, the incorporation of blacks into the framework of American welfare state was uneasy and double-edged. Essentially, this is because, as Gøsta Esping-Andersen pinpoints, "the welfare state is not just a mechanism that intervenes in, and possibly corrects, the structure of inequality; it is, in its own right, a system of stratification". Esping-Andersen (1990: 23). In the American context, the rejection of the universal model of entitlement to welfare rights, and the institutionalization of complex means-testing eligibility rules, made welfare recipients particularly vulnerable to stigmatization. Because blacks were disproportionately represented as beneficiaries of welfare programs, such stigmatization inevitably came to be intertwined with racialized cultural and policy assumptions. See: Lieberman (1998: 4). The explosive undercurrents of such stigmatization would eventually be reflected in the distinction between the deserving and undeserving poor that rationalized the Reaganist assault on the premises of American welfarism. See: Quadagno (1994).

[34] Glazer (1987: 4).

> object of policy and administration and, in the process, became more visible, more complex and more demanding on state funds".[35]

Consequently, although various indicators attested to noteworthy accomplishments of the Great Society experiment,[36] public opinion increasingly came to adopt the view that American public policy had become trapped in a self-reinforcing process of constant bureaucratic expansionism which adversely perpetuated the very problems it purported to eliminate. This paved the way for the rise of a full-blown anti-welfarist ideology which posed a fierce challenge to the legitimacy of New Deal policy creeds. Reagan's famous jest that "some years ago, the federal government declared war on poverty, and poverty won",[37] encapsulated this increasingly widespread view on the legacy of the Great Society experiment.

Concurrently, the faith in the capability of enlarged welfarist expenditures to reduce crime rates was also crumbling. Crime rates rose sharply and consistently from 1960 onwards, with the highest rise between 1965 and 1973.[38] These figures led to a new strand of anti-welfarist argument which used these increasing crime figures as a salient yardstick of governmental failure. The neoconservative attack not only contested the suitability of welfare-centred crime policy to reduce victimization rates. It argued that benevolent welfare policies were in fact increasing crime levels by eroding the values of individual responsibility and personal accountability. In the criminological literature, this approach was most prominently elaborated by James Q. Wilson. In his influential 1975 Right-Realism manifesto *Thinking About Crime*, Wilson urged policymakers to abandon the "illusive" quest for detecting the root causes of crime.[39] He dismissed the effort to reduce crime rates through attempting to transform broad socio-economic structures (an objective which, in his view, is unattainable as it depends on various determinants which are impervious to governmental influence). As an alternative, he called for the creation of stronger disincentives to engage in crime. Such disincentives would include the introduction of tougher penal responses and the

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[35] Garland (2001a: 93).

[36] As Katz (1989: 113) points out, "between 1965 and 1972, the government transfer programs lifted about half the poor over the poverty line...Medicare and Medicaid improved health care dramatically. In 1963, one of every five Americans who lived below the poverty line never had been examined by a physician...by 1970, the proportion never examined had dipped to 8 percent...between 1965 and 1972, poor women began to consult physicians far more often during pregnancy, and infant mortality dropped 33 percent".

[37] Quoted in Garland (2001a: 240).

[38] Garland (2001a: 90).

[39] Wilson (1975).

enhancement of the probability of their imposition (e.g. through more rigorous police apprehension and the creation of determinate sentencing schemes). The validity of this critique of welfarist-centred crime policy seems contestable, as might be demonstrated by the relative success of established welfare states (belonging to the universal and corporatist models in Esping-Andersen's typology)[40] in keeping crime rates relatively low throughout the move to late–modernity.[41] Nevertheless, Wilson's blueprint emerged as a primary source of inspiration to American policymakers.

With the decline of public faith in the suitability of welfarist interventions to provide a remedy to the core social problems which engrossed American society in the late 1960s, policymakers turned to invest in new political projects which would prove more effective in sustaining government's authority and in boosting politicians' electoral appeal. The economic downturn of the mid 1970s, coupled with increasing competitiveness of developing economies abroad, triggered structural changes in modes of capitalist production.[42] As industrial manufacturing came to be increasingly dependent on capital mobility and technological advancement, the focus of the Great Society programs on the reintegration of the economically and socially excluded became inconsistent with the demands of an emerging post-industrial market economy.

With the demise of the Great Society project, the reliance on redistributive welfarist reforms as a central component of anti-crime policy would be discredited and gradually abandoned. From 1980 onwards, a radically alternative political paradigm would come to dominate American politics. This paradigm would preclude the development of welfarist frameworks for tackling crime in general. As I will show below, because patterns of victimization among African-Americans are particularly interwoven with socio-economic factors, this paradigm shift would prove detrimental to the development of adequate responses to the problem of black victimization. At the same time, the new paradigm (which combines anti-welfarist with a 'tough on crime' posture) would facilitate the emergence of penalty enhancement hate crime laws.

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[40] Esping-Andersen (1990).

[41] Lacey (2008:27-29); Reiner (2007a: 103-110). It is important to note that the comparative and historical analysis of crime rates is vexed by measurement problems. However, the figures seem to plausibly fit the typology between different configurations of welfare states, as developed in Esping-Andersen's work.

[42] Harvey (2005: chapter 3).

C1.2. The Crisis of Due Process Reformism and the Dismantling of Procedural Frameworks for Tackling the Under-Protection of Black Victims

By the mid-1960s, legislative and judicial due process reforms had become increasingly interwoven with racial egalitarian projects. As shown in chapter 4, the post-War impetus of due process reform was part and parcel of the efforts of New Dealers to modernize the local and state agencies which served at the front line of tackling the nation's core social problems.[43] These efforts became profoundly interwoven with racial egalitarian projects because of the arrant failure of Southern policing, prosecution and imprisonment institutions to approximate the standards established throughout the rest of the nation, de jure if not de facto.[44] As shown in the previous chapter, the introduction of "federally protected activities" legislation was embedded within a much broader array of judicial and legislative measures aimed at reforming the modus operandi of Southern crime control institutions (e.g. laws and doctrines conferring the right to counsel for indigent defendants; procedural rights; bail reforms).

Any attempt to understand the origins of the crisis of "pro-black" due process reformism has to take into account a peculiar feature of the way in which such reforms were pursued. Although remarkable reforms of criminal procedure were initiated by the legislative and executive branches during the post-War decades,[45] public opinion came to identify the Supreme Court as taking the helm in pushing towards the extension of procedural rights. Beginning with the 1961 landmark decision in *Mapp v. Ohio* (providing that the exclusionary rule on the use of unconstitutionally obtained evidence should bind in state courts),[46] and continuing with the constitutionalization of the right to counsel (on appeal[47] as well as on trial[48]) and the right to trial by jury,[49] the Warren Court established a string of constitutional doctrines that constrained the exercise of discretion by crime enforcement authorities. The Warren and Burger Courts' capital punishment jurisprudence, most notably the landmark decision in *Furman v. Georgia*,[50]

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[43] Simon (2005: 309).
[44] Klarman (2000); Feeley and Rubin (1998).
[45] As Lain (2004) shows, in various areas of due process reforms, state legislatures moved faster and more radically than the Warren Court.
[46] *367 U.S. 643 (1961).*
[47] *Douglas v. California*, 372 U.S. 353 (1963).
[48] *Gideon v. Wainwright*, 372 U.S. 335 (1963).
[49] *Duncan v. Louisiana*, 391U.S. 145 (1968).
[50] *Furman v. Georgia*, 408 U.S. 238 (1972).

likewise reflected judicial concern with the possible impact of institutional discrimination on racial disparities in capital punishment.[51]

The Court had usually steered clear of explicitly referring to the racial implications of these landmark decisions. However, it was noted both by contemporary observers and by legal historians that the focus on criminal procedure was motivated by a deliberate judicial strategy.[52] This strategy sought to retain the role of the Court as a central policymaker on civil rights issues while avoiding another cycle of political resistance akin to the fierce Southern defiance that followed its 1950s landmark decisions in *Brown*[53] and *Baker*.[54] The solution was to tackle institutional racism by means of constraining discretionary governmental practices that were particularly prone to racial abuse rather than by tackling racial segregation head on.[55] However, in the mid-1960s, amid the rise in recorded crime rates and racial riots across the nation, this strategic plan backfired. It created an adverse boomerang effect and rendered the Court vulnerable to exceptionally fierce criticism. This criticism overplayed the constraining impact imposed by these new procedural doctrines on the actual practices of crime enforcement agencies, and presented the Court's putative 'soft on crime' stance as the major obstacle which prevented local, state and federal governments from eliminating the threat posed by crime and criminals to law abiding citizens.[56]

As we will see in the next two sections, the backlash against the progressive procedural jurisprudence epitomized by the Warren Court led to the rise of new strands of conservative crime jurisprudence and populist penal lawmaking. While future Courts (dominated by conservative-appointed justices) refrained from overturning any major precedent of the Warren Court's due process revolution, they significantly curtailed the scope of these rights and entirely abandoned the strategic path of promoting racial justice

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[51] See *McCleskey v. Kemp*, 481 U.S. 279, 330-2 (1987) (Justice Brennan, J., dissenting) (suggesting race played a role in Furman decision).
[52] Kahan & Mears (1998: 1155-1159).
[53] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[54] *Baker v. Carr*, 369 U.S. 186 (1962).
[55] Kahan & Mears (1998: 1155-1159).
[56] Simon (2007a: 116). As William Stuntz has argued, these accusations are ungrounded, among other things, because the Court has left entire fields of crime enforcement impervious to constitutional intervention (e.g. the content of offence definitions; proportionality; and noncapital sentencing). Thus, for Stuntz, the Warren Court's legacy helped to create the post-1980 pathologies of overcriminalization and overpenalization in two complementary ways. First, it provided politicians with new incentives to engage in crime policymaking; second, it channelled their efforts towards those policy fields which remained beyond the reach of criminal intervention (thus impelling legislatures to focus on creating new offences, enhancing penalties, and engaging in sentencing reforms). Stuntz (2006).

through criminal justice reform.[57] At the same time, legislatures at both national and state levels had turned with new vigour to mobilizing a public outcry against 'soft on crime' judges. As a result, this second policy path for tackling the problem of black victimization (ameliorating patterns of institutional racism which generate racially-skewed outcomes and thus preclude the equal protection of black victims) had also become highly impeded. At the same time, determinate sentencing reform flourished, as it provided legislatures with high-profile opportunities to demonstrate their concern for public safety through statutory curtailment of the scope of judicial discretion in sentencing. The bipartisan support for determinate sentencing reform would provide black activists with favourable opportunities for mobilizing sentencing enhancement hate crime laws. However, it was embedded within a broader structure of political rhetoric, policymaking strategies, and institutional arrangements which produce starkly racially-skewed outcomes at virtually every aspect of crime-enforcement (as well will see in section C4 below). Because processes of criminalization consist of various layers of institutional decision-making,[58] the fact that the contemporary "pro-black" criminalization policy was channelled to the field of penalty enhancement (and remained largely ineffective in reducing patterns of police and prosecutorial decision-making which produce racially disparate outcomes)[59] has vastly inhibited its transformative effect.

C2. The Racialized Origins of the Advent of the New Politics of Law and Order: The Formative Years, 1964-1980

The structure of contemporary law and order politics took shape during the period 1964-1980. Two historical processes were particularly consequential throughout this formative period. First, anti-crime policymaking had moved from the periphery of the electoral arena to its very centre. As David Garland notes, whereas, from the Progressive era to the mid seventies, the shaping of crime policy was devolved to professional experts and administrators, from this period onwards, "legislators were becoming more 'hands on', more directive, more concerned to subject penal decision-making to the discipline of party politics and short-term political calculation".[60]

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[57] Bilionis (2005).
[58] Lacey (1995).
[59] As I will show below, section F of this chapter.
[60] Garland (2001a: 13).

Second, the traditional ideological divides between the two major parties had dissolved. In the post-War years, public debates on crime policy reflected a controversy between two competing approaches. For social-democratic liberals, the problem of crime was conceptualized as a symptom of more structural social pathologies associated with poverty and inequality. Accordingly, proponents of penal welfarism argued that crime rates were reducible by extending public spending on anti-poverty measures and the rehabilitation of convicted offenders.[61] As noted above, by the 1950s, New Deal liberals had also become increasingly concerned with the tendency of the criminal justice system to over-target racial minorities and the poor and thus to entrench deep seated patterns of social inequality.[62] The centring of due process rights on the social-democratic agenda reflected this recognition (which had also found more radical expressions, e.g. the campaigns for de-criminalization and the de-institutionalization of penal policy, mobilized by New Leftists).[63] On the other hand, the conservative approach expounded "crime" as a product of individual choice and moral wrongdoing. Derivatively, conservatives stressed the need to erect tougher disincentives which would dissuade would-be perpetrators from committing offences.

By contrast, the post-1970s American politics of crime has been shaped by the convergence of the ideological positions of both major parties around the etiological narrative and policy solutions which were hitherto advocated by conservatives. As will be shown, this process of convergence resulted in a constant escalation of the punitiveness of criminal justice policymaking. In what follows, I will briefly explore the processes which shaped these two constitutive features of contemporary American politics of crime. Our discussion will give particular emphasis to the way in which these changes were shaped (inter alia) by strategic forms of political mobilization aimed at appealing to voters who opposed civil rights reforms. This emphasis is important for understanding the racialized character of contemporary law and order politics. I will then show how this racialized character inhibits the receptiveness of contemporary law and order politics to most forms of "pro-black" reform. This observation will serve as a basis for raising a cluster of distinctive questions regarding the uneasy relationship between hate crime laws and racial justice.

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[61] Garland (2001a: chapter 2).
[62] Simon (2004).
[63] Christie (1986).

Although, as Marie Gottschalk shows, the agitation of law and order concerns served as a vehicle of political mobilization in various early epochs in American history,[64] the first systematic attempt to test the strategic fecundity of "governing through crime" in a national electoral campaign was introduced by Republican candidate Barry Goldwater during his 1964 presidential contest with Lyndon Johnson.[65] The fact that this electoral experiment emerged at the very same year in which civil-rights reformism had moved to the forefront of the domestic agenda of the Democratic Party was no coincidence. Goldwater's efforts to distinguish himself from his contender by emphasizing that he "would not support or invite any American to seek redress...through lawlessness...and violence"[66] formed a part of a deliberate strategy to appeal to Southern Democratic voters who had become alienated by their Party's leaning toward the racial egalitarian cause. In scorning the receptiveness of the Johnson administration to civil rights protests as precipitating "lawlessness and violence", Goldwater introduced into the national political debate a set of rhetorical themes that had been strategically utilized by earlier generations of Southern white supremacist politicians. As we saw in chapters 2 and 3, the claim that the political emancipation of blacks would yield a surge of crime and disorder was invoked by the antebellum planters' elite, and then by post-bellum Redeemers, in order to undermine the legitimacy of Northern intervention in Southern racial affairs. Resonating with social Darwinist theories of blacks' innate violent propensities, this argument continued to rationalize Southern resistance to desegregation throughout the first half of the twentieth century. With the escalation of black protest against desegregation and disenfranchisement in the 1950s, Southern authorities represented civil rights protest as eroding respect for law and order, and used such apologetics to rationalize the use of exceptionally repressive measures to quell black protest. However, although Goldwater's strategy proved consequential in attracting a larger portion of white Southerners to the ranks of the national Republican Party, it ultimately failed to establish law and order as a powerful wedge issue which would destabilize the Democratic voting base, as is evident from Johnson's landslide victory.

The fact that a political platform that was so utterly rejected in 1964 played a decisive role in securing the Republican triumph in the following presidential elections,

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[64] Gottschalk (2006: chapter 3).
[65] Beckett (1997: 31).
[66] Quoted in Beckett (1997: 31).

and has been an indispensable component of the policy platforms of both major parties ever since, demonstrates the profound impacts of the tumultuous period of 1964-1968 on the nation's political consciousness.[67] Starting with the Watts riots of 1965, which erupted only one week after the signing of the Voting Rights Act into law, more than 400 recorded riots flared up in black urban ghettoes across the nation. The riots dramatically polarized public opinion on the next steps that should follow the landmark civil rights legislation of the mid 1960s.[68] In the eyes of African-Americans, the riots reflected a spontaneous protest against the incompleteness of these recent reforms. They were intended to communicate to a Northern audience that the nation's reckoning with the problem of racial inequality could not end with the abolition of formal segregation and the provision of equal opportunity and voting rights. A sustainable solution to the nation's racial wounds would also have to address the forms of informal racial discrimination which permeated Northern economy and society. Conversely, in the eyes of the majority of whites, the riots provided an alarming signal that their receptiveness to racial reformism generated unreasonable expectations among African-Americans. Then followed a cyclic dynamic of the radicalization of blacks' racial consciousness (including the revival of black separatist ideology), on the one hand, and of the diminishing legitimacy of black protestors' grievances, on the other hand. The disruptive potential of Northern black insurgency became particularly salient since it constituted part of a wider 'cycle of protest' that surged across the nation. By 1968, college campuses became sites of mass demonstrations (particularly against the Vietnam War and against nuclearization) and an emerging hippie culture was calling into question various sorts of political and social authority.[69]

This political climate was conducive not only to the elevation of the law and order issue from the periphery of national political debate to its very centre. It also facilitated the proliferation of a new conservative discourse which amalgamated opposition to the furthering of civil rights reforms with calls to 'get tough' on crime. The electoral fecundity of this discourse was proven for the first time in the watershed presidential contest of 1968. In an attempt to win white working class voters, Nixon "promised to reverse the soft approach allegedly practiced by 'bleeding heart', 'do-

[67] Flamm (2005); Edsall & Edsall (1992: 48-9).
[68] Marx (1998: 240); Button (1978).
[69] Tarrow (1989).

gooding' liberals"[70] with an uncompromising response to urban crime and disorder. Under Democratic administrations, Nixon complained, "we didn't have strong enough law enforcement officials; we didn't have strong enough laws; we didn't have...judges who...clearly realized that it is important to strengthen the peace forces as against the criminals in this country".[71] As an alternative, the Republicans advocated the introduction of measures such as mandatory minimum sentences, fewer pre-trial releases, and the nomination of judges who espouse to a "tough on crime" approach.[72] The Democratic Party dismissed these challenges and sought to contain them by reaffirming the principles of penal welfarist orthodoxy. However, this strategy proved ill-advised from an electoral perspective. The failure of the Democratic anti-crime platform was dramatized when its National Convention, held in Chicago, was severely interrupted by the outbreak of fierce local racial riots.[73]

The political forces pushing toward the ideological convergence between the anti-crime platforms of the two major parties were associated with the de-alignment of the New Deal coalition. The civil rights reforms championed by the Johnson administration consolidated the bond between African-American voters and the Democratic Party. However, paradoxically, it was this consolidation of blacks' party-affiliation that diluted their political leverage, as they were no longer identified as swing voters for whose allegiance the two major parties had to compete.[74] At the same time, blue-collar whites, who, throughout the New Deal era, were considered the solid core of the Democratic voting base, became increasingly alienated by the Party's racial reformist platform. They were now identified as a stockpile of volatile swing voters, who felt particularly concerned over the problems of urban crime and disorder and welfare abuse. Taken together, this reconfiguration of the Democratic voting base entailed both an increasing polarization between its two main electoral blocks, and a remarkable shift in the balance of electoral leverage between these two constituencies.

By appropriating the law and order issue in the late 1960s, Republicans were able to realign a new winning coalition by drawing masses of social conservative blue-collar voters across the partisan aisle. This trend became noticeable with Nixon's

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[70] Marion (1994: 69).
[71] Quoted in Marion (1994: 71).
[72] Marion (1994: 70).
[73] Ibid, 72.
[74] Stuntz (2008: 2006).

appeal to the "silent majority". It became more conspicuous throughout the 1980s when "Reagan Democrats" played an important part in securing his landslide victories. Reagan's crusade against 'welfare abusers'[75] and 'soft-on-crime judges', and his effective agitation of working-class resentment of the alleged symbiosis between welfare dependency and criminality, were pivotal to his success in aligning a coalition of fiscal conservatives and blue collar workers.

The success of the Republican Party in mobilizing around the law and order issue was gradually met by a strategic inclination of the Democratic Party to abandon the principles of welfarist crime policy.[76] Between 1972 and 1980, while liberal Democrats controlled Congress, two-thirds of state legislatures, and the large majority of governorships and big-city mayoralties, the nationwide prison population rose by 50 percent.[77] Although less inclined to advert to racist codes while debating crime-related issues, Democratic candidates had steered clear of associating themselves with policy campaigns which challenged the creeds of the new ultra-punitive crime policy. Following this twofold structural change (the increasing salience of law and order politics, and the collapse of the ideological divides between the two major parties), late-modern American politics of crime became a locus of fierce "race to the top" contests of penal populism. The structure of the political debate poses decisive electoral imperatives which dissuade legislatures from questioning the premises of 'tough on crime' policymaking.[78] Within this context, criminal lawmaking is no longer exclusively – or even predominantly - concerned with devising the most effective policy interventions for minimizing the scope of some unwarranted social phenomenon. Rather, "governing through crime" became a generic frame of social construction which serves to advance a wide range of independent electoral and administrative goals.

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[75] One of Reagan's favourite anecdotes was a story of a Chicago welfare queen with "80 names, 30 addresses, 12 Social Security cards and a tax-free income of $150,000". Quoted in Edsall & Edsall (1991: 148).

[76] Interestingly, the process which eroded the ideological divide between the Tory and (New-)Labour in British politics of crime followed a similar dynamics. See: Lacey (2008: 173-178).

[77] Stuntz (2008: 2008).

[78] Lacey (2008: 69-70).

C3. 1980 and Beyond: The Rise of Victim-Centred Lawmaking from the Ashes of the "Civil Rights Revolution"

Since the early 1980s, the American politics of crime has been dominated by a new model of lawmaking, which is specifically geared to facilitate legislatures' capitalization on the electoral rewards of penal populism. This model combines two fundamental aspects. First, it is premised upon a selective mode of framing the putative needs and interests of crime victims. These needs and interests are portrayed as revolving around the imposition of harsher penalties and the curtailment of offenders' procedural rights. Non-retributivist forms of tackling crime and particularly its socio–economic dimensions are systematically nudged out of the current agenda of victims' rights politics.[79] The second aspect pertains to the intensive use of the symbolic figure of the victim of crime as an idealized political subject whose experiences and vulnerabilities are treated as defining the needs of the citizenry at large. As we will see in *Parts D* and *E* of this chapter, these two features of contemporary criminal lawmaking have been highly influential on the contours of hate crime legislation. The limited suitability of hate crime legislation in addressing the needs of African-American victims reflects the generic flaws of this model of "pro-victim" lawmaking.

The impetus for the surge of "pro-victim" criminal lawmaking has been provided by the victims' rights movement, which emerged in the mid 1970s.[80] The Movement grew out of concerns with the failure of modern procedural doctrine to accommodate the legitimate needs of victims in the criminal process. However, while political concerns with the suffering of crime victims could have been translated into various forms of policy responses (including, for example, the extension of social services to victims and their families; investing in restorative justice schemes and other deinstitutionalized forms of responding to crime),[81] in the US, the concept of victims' rights has been framed in a very narrow fashion. The dominant way of interpreting the meaning of victims' rights in American law was encapsulated by the preamble to California's Bill of Victims Rights. Enacted in 1982, the preamble defined the term *victims' rights* as reflecting an

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[79] Gottschalk (2006: 114).
[80] Weed (1995).
[81] Christie (1977).

"expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance".[82]

The wave of procedural and penal reforms passed over the last decades in order to institutionalize this notion of victim's right was predominantly couched in terms of a zero-sum-game in which victims are believed to be empowered mainly by the harshening of penal standards and the curtailing of procedural rights. The repertoire of symbolic legislation enacted in the name of concern with victims' rights currently encompasses draconian penal policies such as 'three strikes and you're out', '10-20-life', 'adult time for adult crime' and various other examples of 'sound-bite' driven policies.[83] Another salient strand of "pro-victim" legislation has introduced severe post-detention civic sanctions on convicted offenders. For example, the Work Opportunity and Personal Responsibility Act of 1996 banished most ex-convicts from Medicaid, public housing, and related forms of welfare assistance.[84] The scope and range of felon disenfranchisement laws has also expanded dramatically over the last three decades.[85] In 2003, nearly 4 million Americans had temporarily or permanently lost their right to vote, of which 1.39 million had already served their sentence in full (in ten states, all ex-felons are disenfranchised for life).[86] While these sanctions are presented as "pro-victims", their suitability to discourage recidivism and thus to serve their purported protective goals seem highly questionable. More plausibly, their tendency to erect insuperable barriers to ex-offenders' integration into normative social and economic networks serves the very opposite purpose and thus exacerbates levels of crime and victimization.[87]

The trajectory of the determinate sentencing reform movement reflected the broader process whereby the ideological divides between the two major parties had been dissolved in favour of a bipartisan adherence to populist forms of "pro-minority" policymaking. In the early 1970s, the indeterminate sentencing model (which played a pivotal role within the system of penal welfarism)[88] came under attack from both left and right. However, by and large, the sweeping sentencing reforms institutionalized over the next decades were

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[82] Cal. Cons. Art. I, S. 28.
[83] Garland (2001a: 13).
[84] Wacquant (2002: 58).
[85] Behrens (et al, 2003).
[86] Wacquant (2002: 58).
[87] Western (2006: 5).
[88] Garland (2001a: 34-35).

insulated from the concerns raised by leftists. The left critique of indeterminate sentencing was threefold. First, liberal critics pinpointed the susceptibility of open-ended sentencing guidelines to create opportunities for discriminatory exercise of discretion by judges and parole boards.[89] Second, liberal penal theorists argued that indeterminate sentencing schemes compromised principles of proportionality and just desert.[90] Third, New Left critics scorned the intrusive and paternalistic aspects of the power/knowledge matrixes which modern penology, and the correctional bureaucracies to which it gave rise, brought with them in treating offenders as objects of rehabilitative interventions.[91] As Michael Tonry has noted, none of these three aspects of the left critique of indeterminate sentencing frameworks appear to have been ameliorated following the massive institutionalization of sentencing reforms throughout the last three decades.[92]

Instead, the late-modern agenda of determinate sentencing reform focused on amplifying the conservative critique of progressive due process judicial reformism. This critique portrayed the individualized nature of judicial policymaking as tilted towards an imbalance between the rights of criminal defendants and the rights of law-abiding citizens to be "free from violent crime". As we saw earlier (section C1.2), the political salience of this critique was boosted in the mid-1960s amid the coupling of climbing crime rates and an increasingly visible involvement of the Supreme Court in incorporating racial egalitarian principles into constitutional procedural doctrine. Also, I have argued that these forms of electoral mobilization have been profoundly interwoven with strategic efforts to appeal to counter-egalitarian popular sentiments by means of revivifying the age-old association of blackness with criminality.[93] Thus, much as, for the Warren Court, the focus on due process jurisprudence was motivated by strategic efforts to engage in racial egalitarian judicial policymaking without endorsing race-specific campaigns, so, for conservative politicians, calls to rein in judicial involvement in crime policymaking served as a legitimate medium for appealing to anti-civil rights constituencies. In this context, it is unsurprising that, as Michael Tonry has shown, determinate sentencing reforms disproportionately targeted forms of criminality which are particularly prevalent amongst urban black males.[94]

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[89] American Friends Service Committee (1971).
[90] Von Hirsch (1976).
[91] Foucault (1979).
[92] Tonry (2005: 1249-1260).
[93] Wacquant (2002: 55-56).
[94] Tonry (1995: 104-116).

Concurrently with the wave of 'tough on crime' criminal lawmaking, American politics of crime became inexorably unreceptive to policy initiatives that focus on the socio-economic causes and implications of victimization. The peculiarity of this development has been illuminated by Marie Gottschalk in her comparative study of collective action frames used by victims' advocacy movements in USA and in Europe.[95] As Gottschalk demonstrates, in continental Europe, victims' rights movements have put much greater emphasis on extending social and therapeutic services for victims and their families, and did not at all focus on demands to curtail offenders' procedural or welfare rights. These disparities shed light on the extent to which the development of adequate policy responses to the problem of victimization in the US have been constrained by the limited degree of social consensus around the principles and institutions of the welfare state (in comparison with the universal or corporatist models of welfarism which prevail in continental Europe).[96] This feature has channelled both activism and policymaking in this field towards symbolic – rather than material – avenues of reform and redress. As Robert Elias has shown, although social assistance provisions were also included in many pieces of victims' rights legislation, the actual realization of such provisions has been severely compromised by problems of underfunding and the general deterioration of the welfare institutions through which these services had to be delivered.[97]

As I will argue, because patterns of minority victimization are profoundly interwoven with patterns of socio-economic deprivation, the structure of American victims' rights discourse has highly constrained the development of adequate policy responses to the problems of minority victimization (and particularly, given the disproportionate rates of poverty among African-Americans, to the problem of black victimization). This observation might be obscured by the favourable conditions provided by this structure to the mobilization of hate crime policies.

C4. The New Politics of Crime and the Demise of the "Civil Rights Revolution"

As American legislatures became engrossed in a race-to-the-top competition over the introduction of harsher penal responses to crime, the nation's prison population began to grow at rates that appear to be unparalleled in both historical and comparative

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[95] Gottschalk (2006: 81).
[96] Epsing-Anderson (1990).
[97] Elias (1983: 213-24); see also Gottschalk (2006: 89).

perspective.[98] Between 1970 and 2003, the American prison population multiplied sevenfold.[99] Today, the US boasts the highest incarceration rates per capita worldwide.[100] The revanchist character of contemporary American crime policy is also reflected in various other contexts. Since the resurrection of the death penalty after a de-facto moratorium on executions between 1967 and 1977 (and declining rates of death penalty during the preceding decades), the number of offenders sentenced to death has climbed and the rates of executive pardons have substantially declined.[101] Following the spread of determinate sentencing reforms, average sentencing periods in the USA have became significantly longer than in other Western democracies.[102] These penal trends have been fuelled by the constant expansion of the scope and range of criminal laws over the last decades.[103] Though the problem of over-criminalization harks back to the heyday of New Deal regulatory expansion[104] (and, in some contexts, was arguably noticeable already in the nineteenth century),[105] its scale has grown immensely in recent decades.[106] The rise in public spending on prisons,[107] and the tried-and-tested electoral rewards of penal populism, impel politicians to reconstruct virtually all sorts of social problems in terms of crime.[108]

African-Americans have been at the receiving end of these penal trends. Although the overrepresentation of African-Americans in jails and prisons has been persistent since the post-Reconstruction era, the racial composition of America's carceral institutions has become dramatically uneven throughout the last third of the twentieth century. In 1960, before the 'civil rights revolution', blacks amounted to 37% of state and federal prison inmates. Their proportion had climbed to 41% by 1970, 44% by 1980, 49.2% by 1990 and 49.9 by 1995[109] (throughout that period, the proportion of blacks in the overall population remained stable around 13%). Of course, the staggering

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[98] Western (2006: 12-15).
[99] The prison population in 1970 was 198,831; by 2003, the number stood at 1,387,269. Stunz (2006: 789).
[100] Bosworth (2009: 3).
[101] Banner (2002: chapter 10); Steiker and Steiker (1995).
[102] For example, as of 1999, average sentences in France amounted to 8 months vs. 34 months in USA (Whitman, 2003: 70).
[103] Stuntz (2001: 512-522).
[104] Kadish (1963).
[105] Novack (1996).
[106] Stuntz (2001: 512-522).
[107] Between 1972 and 2001, overall public spending on prisons had surged 455% in constant dollars. See: Stuntz (2001: 784).
[108] Simon (2007a: 4).
[109] Tonry (2005: 1255).

mounting-up of the overall inmate population during that period makes these figures even more dramatic. The black/white incarceration ratio for males has grown from 3:1 in 1968 to 7.6:1 in 2002[110] (the black/white incarceration ratio for women by 2002 was 5.5:1).[111] In 1994, one in every three black men between the ages of eighteen and thirty-four was under some form of correctional supervision.[112] This rendered the odds of an African-American man going to prison today higher than the odds he will go to college or get married.[113] It is striking, and sad, that these figures refer to a generation of African-Americans that were born immediately after the "civil-rights revolution".[114]

In *Malign Neglect*, Michael Tonry rebutted two conventional explanations of the aggravated overrepresentation of African-Americans behind bars.[115] According to Tonry, the post-1970s prison-boom did not reflect an increasing frequency or more violent patterns of black criminality. Nor was it a product of a more biased application of judicial discretion in individual cases.[116] Rather, the figures appear to be directly linked to the introduction of a cluster of criminalization and sentencing policies that disproportionately targeted forms of criminality associated with black offenders. Such policies were firstly introduced as part of the War on Drugs in the 1980s (most notably, the crack/cocaine 100:1 sentencing ratio).[117] From the 1990s, the widespread introduction of novel and stricter policing strategies for addressing street crime (e.g. 'zero-tolerance policing' and other derivatives of the proliferating 'broken windows' theory)[118] and of determinate sentencing schemes (e.g. habitual offending laws)[119] have produced starkly disparate outcomes across racial and class divides.[120] As Tonry argues, even if the introduction of these policies was not motivated by sheer racial animus, it surely reflected a reckless disregard of the foreseeable consequences of aggravating racial disparities in incarceration. The fact that these policies have not been repealed in the face of overwhelming evidence of their racially-skewed

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[110] Gottschalk (2006: 3). This figure stands for the number of inmates per a 100,000 population.
[111] Tonry (2005: 1256).
[112] Lacey (2008: 124).
[113] Simon (2007:141).
[114] The most comprehensive empirical study of the links between mass incarceration and other patterns of racially-skewed socio-economic exclusion can be found in Western (2006: chapter 1); for a qualitative informed study of this questions, see: Anderson (2009).
[115] Tonry (1996).
[116] Tonry (2005: 1256).
[117] Sklansky (1995); Cole (2000: 141-144).
[118] Harcourt (2001).
[119] Zimring (et al, 2001).
[120] Cole (2000: 148-149); Mauer (1999: 136-137).

application provides a troubling illustration of the extent to which the structure of contemporary American politics of crime preclude legislatures from actively and openly supporting the types of criminal justice reforms which are most necessary for ameliorating the selective targeting of black offenders by the criminal justice system.

The overwhelming incarceration rates among African-Americans have dramatic detrimental effects on their prospects of social and economic integration. These effects are produced both by formal legal restrictions on ex-convicts' civic entitlements, and, more pervasively, by informal and thus more elusive forms of exclusion. The most salient illustration of the power of "pro-victim" legislation to serve as a constitutionally permissible form of large-scale exclusion of citizenship rights is provided by felon disenfranchisement laws.[121] By 1997, felon disenfranchisement laws banned one in seven black men nationwide from voting.[122] However, it seems that these figures reveal only the tip of a very big iceberg: the whole range of informal exclusionary effects which emanate from the hyper-incarceration of young African-American males. In various contexts of everyday life, the framing of racial animus as a problem of crime-governance serves to legitimate exclusionary practices which were de jure outlawed in the wake of the "civil rights revolution". For instance, while formal racial segregation is passé, de facto segregation in public education brought about by white flight from black-concentrated residential areas is still pervasive,[123] and "efforts to keep largely minority group city residents out of suburban shopping centers, parks, and residential communities" have been normalized.[124] A sizable body of quantitative and qualitative studies has documented the devastating collateral impacts of mass incarceration on black communities and families.[125] Studies examining the impact of mass incarceration on patterns of racial exclusion from the labour market have shown not only that ex-convicts are de facto prevented from gaining access to secure jobs,[126] but also that the common association of blackness with "dangerousness" (which has, of course, deep roots in American history but has been revivified by the pervasive racialization of the late-modern politics of crime) diminish the entry-level prospects of African-Americans who do no

[121] Roberts (2003: 1291-1293).
[122] Wacquant (2002: 58).
[123] Messay (1995).
[124] Simon (2000: 1125).
[125] Chesney-Lind and Mauer (2003); Roberts (2003: 1281-1297); Clear (2009).
[126] Western (2006: chapter 5).

have a criminal record.[127] Thus, in the very same period in which "diversity rhetoric" has gained currency in constitutional jurisprudence, mainstream political discourse and even in managerial literature,[128] the disproportionate targeting of African-American males by criminalization policies serves to reinforce forms of exclusion which probably would not have been openly tolerated in virtually any other public policy context.

The fact that the hate crime campaign, an unprecedentedly prolific form of "pro-black" criminal legislation, had flourished within the political environment which have produced these relentless forms of racial exclusion should prompt us to consider a range of distinctive questions regarding the functions played by hate crime reforms in contemporary American democracy. Have the prolific hate crime campaigns served to displace other forms of "pro-black" activism and policymaking in the criminal justice field? To what extent are political and legal discourses of hate crime successful in spotlighting the nexuses between the problem of black victimization and other patterns of unequal enforcement of criminal laws (as well as the collateral impacts of such unequal enforcement)? How does the embedding of the hate crime criminalization regime within the broader ideological and institutional structures which produce such disparate outcomes affect its performances in protecting black victims?

C5. Summary: Toward an Understanding of the Impact of the Restructuring of American Politics on the Contours of Hate Crime Policy

To summarize, in this section I have delineated the broad structural transformations which took shape in American politics of crime over the last decades. I showed that, throughout this period, the two major policy domains which dominated the agenda of racial egalitarian reform in the mid 1960s (namely, redistributive welfarism and due process reform) were dismantled. Their decline was intertwined with the rise to dominance of a new strand of criminal lawmaking, revolving around the introduction of more severe and more determinate penal responses to crime in the name of concern with victim's rights.

In the next sections, I will show that the rise of this new strand of "pro-victim" lawmaking has facilitated the emergence of hate crime laws in two major ways. First, it

[127] Pager (2007); Roberts (2003: 1293).
[128] Edelman (et al, 2001: 1590).

created an institutional setting which was conducive to the mushrooming of single-issue organizations which focus on the problem of victimization and effectively mobilize for policy reforms. However, our analysis in this section has shown that, because of the intrinsic limits of this strand of "pro-victim" legislation, the range of policy remedies available to black activists mobilizing around the problem of victimization was very narrow (in essence, it is confined to legislative models which can affirm legislatures' "tough on crime" credentials). Second, as our discussion in section C4 has demonstrated, the exacerbation of racial disparities in incarceration created a set of incentives to enact a new legal framework which would reconcile "tough on crime" policymaking with the nation's self-image as a multicultural democracy. Insofar as the enactment of hate crime policies has indeed served to reinforce public belief in the racial neutrality of contemporary law and order politics, it had double edged effects on the struggle for racial justice.

The broad structural shifts delineated in this section created a climate which was conducive to the reframing of – and to the designation of new penal responses to - the age-old problem of white supremacist violence. The institutional design and ideological representations which have shaped this new legal framework were mediated by the strategic activities of the advocacy organizations and policymakers who have conjointly shaped the hate crime agenda. In the next sections, I move to look more closely at the underpinnings, patterns and effects of these strategic activities of legal mobilization.

D. The Organizational and Institutional Underpinnings of the Reframing of Black Victimization as an Instance of "Hate Crime"

D1. The Emergence of New Forms of Mobilization around the Problem of Black Victimization

As Kendal Broad and Valerie Jenness have demonstrated, the idea of devising a distinctive legislative framework for penalizing the victimization of minority groups began to gain ground on the agenda of progressive social movements in the early 1980s.[129] In order to facilitate that goal, a coalition of advocacy organizations from within the feminist movement, the gay and lesbian movement, the black community, the Jewish community, and the disability rights movement, began to mobilize at both state and national levels. These

[129] Broad and Jenness (1997: chapter 6).

campaigns sought to prod greater public awareness of forms of victimization which had long been under-enforced by the criminal justice system, and to persuade legislatures to enact a new legislative model which would remedy these traditional patterns of unequal protection.

The strategic focus of the hate crime campaign on demanding the introduction of penalty enhancement as the primary redress for the ordeal of minority victims was by no means inevitable. In the 1970s, anti-violence organizations within the gay and lesbian movement, the feminist movement and the black community predominantly focused on establishing victim-assistance services, conducting educational campaigns, working with local level crime enforcement agencies, and documenting and publishing data on the extent and patterns of anti-minority violence. These initiatives were mostly conducted at the local level, and were thus better positioned to link the problem of under-protection with related symptoms of inequality which members of minority community had faced. As explained by political scientist Lisa Miller, locally based interest groups "are more likely to represent interests that are decoupled from bureaucratic imperatives".[130] In the context of race in particular, they are also more likely to represent the concerns of citizens whose crime victimization is coupled with concern for community members who may be over-targeted by anticrime strategies.[131] Indeed, as shown by Broad and Jenness, the forms of mobilization which emerged around the problem of minority victimization in the 1970s gave strong emphasis to linking the under-protection of minority victims to related issues of relative disadvantage, such as police brutality and underrepresentation in legislative and administrative institutions.[132]

Distinctively, the campaigns which led to the passing of the hate crime legislation in the 1980s were primarily conducted at the state and national levels, and spearheaded by a network of new advocacy organizations which focused exclusively on the problem of "hate crime". As Broad and Jenness have shown, the accelerated development of hate crime activism and policymaking since the 1980s was enabled by a process of 'coalition building' in which these organization highlighted the similarities between the forms of victimization to which different minority groups were subjected. Instances of racist, homophobic, anti-Semitic and sexist violence were now reframed as related symptoms of a national epidemic:

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[130] Miller (2008: 23).
[131] Ibid, ibid.
[132] Broad and Jenness (1997: chapters 3, 4).

intolerance toward "those who are different".[133] While such processes of 'coalition building' increased the effectiveness of the hate crime campaign, it led to the obfuscation of the specificity of the causes and patterns of the forms of violence to which each of these groups is subjected. The anti-hate crime campaign aligned the problem of black victimization with forms of violence which do not appear to be closely associated with patterns of socio-economic deprivation (e.g. homophobic and anti-Semitic victimization). At the same time, the problem of blacks' vulnerability to interracial victimization was dissociated from the most acute patterns of social marginalization and discrimination which are sui generis to the context of American race relations (e.g. the way in which racialized stereotypes of black dangerousness permeate police culture or the way in which the impaired legitimacy of the criminal justice system within black communities impedes African-American victims from resorting to police protection).[134]

The particular mode of framing the problem of "hate crime" and of designating penalty enhancement as a suitable solution was responsive to the new opportunities which the proliferation of 'law and order' politics provided for mobilization around the problem of victimization. However, the forces which facilitated the integration of "pro-black" organizations into this campaign were also associated with endogenous changes which took place within the field of black activism itself. These changes stemmed from the dismantling, between mid 1960s and the early 1980s, of the underlying demographic and political conditions upon which the effective struggle of the Civil Rights Movement rested. The removal of these conditions had constrained the ability of black activists to set a distinctive agenda of "pro-black" criminal justice reform, and impelled them to align themselves with organizations mobilizing around other forms of minority victimization. I now move to elaborate on this point with some historical detail.

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[133] Levin and McDevitt (2002). The hyperbolized and a-historic synopsis of this oft-cited book may illustrate the dominant tone of much of the public debate on hate crime in America. "Hate crimes...were once considered the rare illegal actions of a small but vocal assortment of extremists who thrived on hating minorities. No more. In this new book...these most-recognized authorities and media commentators reinterpret this scourge of our generation- hatred based on race, religion, sexual orientation, ethnicity, gender, and even citizenship. In the aftermath of the worst act of terrorism in this country's history- the bombing of the World Trade Center on September 11, 2001- the authors probe the causes and characteristics of such acts of hatred and, most vitally, their consequences for all of us". (Ibid, back cover).

[134] Cole (2000: 11-12).

D2. The Organizational Underpinnings of Black Mobilization around the Problem of "Hate Crime": From Grassroots Mobilization to Single-Issue Advocacy Organizations

As we saw in chapter 4, the problem of racist violence formed one of the most focal grievances around which the Civil Rights Movement mobilized. The Movement effectively attracted public attention to the way in which the victimization of African-Americans in the South exhibited an appalling symptom of a systemic political problem: the failure of the national administration to intervene in the brutal repression of blacks' civil rights in the South. The Movement emphasized that the plight of black victims could only be ameliorated by means of abolishing the way in which race relations had been structured under the Southern racial caste system. I have argued that this strategic mode of framing defocused various other forms of racial harm which prevailed in Northern society. Nevertheless, it constituted an exemplar of an effective integration of a "pro-minority" criminalization campaign into a broad and internally coherent (even if incomplete) vision of structural racial reform.

I have also shown in chapter 4 that the Movement's success in establishing itself as a recognized collective actor mobilizing on behalf of the shared interests of all African-Americans was made possible by a cluster of specific conditions which became fully materialized in the post-War decades.[135] For example, the spatial concentration of blacks of virtually all classes in the segregated urban ghettoes cultivated the formation of communal institutions (most notably, black churches, colleges, and local chapters of the NAACP). In turn, these institutions served as vehicles for forging collective political identity and for recruiting leaders and foot-soldiers for the Movement's protest activities (in particular, direct action and marches). However, as Loïc Wacquant has argued, over the last decades, growing gulfs between the black bourgeoisie and the black proletariat (and sub-proletariat) have taken shape, amid the relocation of the former from the heart of the ghetto to satellite black neighbourhoods in its periphery or to (white dominated) suburbs.[136] In light of the transition from welfarist-centred to penal-centred governance of the everyday life of the ghetto's population,[137] today the urban black ghetto no longer serves as a vehicle of positive social cohesion, "a sheltered space for collective sustenance and self-affirmation in the face of hostility and

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[135] See section B of chapter 4.
[136] Wacquant (2001: 103-108).
[137] Beckett & Western (2001); Wacquant (2008).

exclusion".[138] Rather, Wacquant points out, it has "devolved into a one-dimensional machinery for naked relegation, a human warehouse wherein are discarded those segments of urban society deemed disreputable, derelict, and dangerous".[139]

The political conditions that facilitated the convergence of interests between the Movement and the federal administration in the 1960s had also evaporated. The electoral leverage of the black vote was curtailed in light of the destabilization of the New Deal coalition (and the increasing need to appeal to blue collar median voters).[140] The ideological orientation of the federal administration was itself radically transformed following the Reagan revolution, which had discredited the very creeds upon which the New Deal model was premised. As a result of such processes which decomposed the conditions upon which the post-War flourishing of black activism rested, the contours of the struggle for racial justice have been radically altered. The post-War terrain of black activism was spearheaded by an allied network of organizations and elites, capable of mobilizing large masses of black protestors around a relatively coherent agenda of racial reform. This agenda encompassed a relatively wide range of issues, spanning such problems as discrimination in housing, education, voting, victimization, and equal opportunity at large. To emphasize, the relative coherence of post-War black reformist agenda was not a product of the absence of oppositional voices or disagreements within the black community.[141] It was enabled by the capability of this allied network of elites and organizations to effectively control the way in which the goals and strategies of black emancipation were prioritized and represented.

By contrast, the late-modern terrain of black activism is no longer orchestrated by a centralized leadership. Rather, it encompasses a plethora of specialist organizations which promote a much more fragmented agenda of progressive initiatives. This shift entails the declining strategic priority of grassroots mobilization as a focal vehicle for forging racial solidarities and for expressing the 'collective will' of African-Americans, and the increasing salience of single-issue advocacy organizations as the dominant definers of the goals and strategies of the contemporary pursuit of racial justice.[142] The

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[138] Wacquant (2001: 107).
[139] Ibid, ibid. See also Wacquant (2004: 6).
[140] As explained in my discussion above, see section C2.
[141] Haines (1988).
[142] This development is pronounced not only in the field of black activism, but also in various other fields of progressive mobilization. For a variety of perspectives on the origins and consequences of this paradigm shift, see: Scheingold & Sarat (2004).

limitations imposed by this structural transition on the prospects for egalitarian reform were discussed by Joel Handler in an influential critique of the legal campaigns mobilized by the new generation of civil rights activists.[143] In Handler's view, "the scattered set of issues, complaints and demands" mobilized by present-day racial reformers "do not constitute a unified force or vision...there is no comprehensive design of a just order as the necessary and desirable outcome of revolutionary or reformist change".[144] "The absence of 'alternative'", he emphasizes, "is not just a matter of the failure of intellectual imagination or political vision".[145] Rather, he opines, it emanates from the structural constraints imposed by the post-modern condition – with its focus on challenging the epistemological premises of 'grand' emancipatory visions or the ontological integrity of the "political subject" which they seek to empower - on the very possibility of articulating a viable platform of emancipatory political change.

Handler's argument can be criticized for downplaying some of the welcome aspects of this development. As was convincingly demonstrated by black feminists' reflections on the Movement's legacy, the coherence of the post-War vision of black emancipation was enabled by the marginalization of the distinctive experiences of women within the African-American community.[146] Indeed, it seems that such marginalization is inescapable for any attempt to assert the shared interests and aspirations of individual members of an imagined community and to translate these inspirations into legalistic forms. Nevertheless, I believe that Handler's critique usefully draws our critical attention to the risk that the fragmentation of modern social movements will end up producing a cacophony of critical voices, none of which possesses the ability to transcend beyond its particularistic viewpoint and to trigger a weighty challenge to white hegemony.

A neo-Marxist interpretation of Handler's observation can further illuminate the driving forces which constrain the likelihood that such 'cacophony of black voices' will bring about structural egalitarian reforms. It is arguable that, although the fragmentation of modern (first wave) social movements make room for representing a wider spectrum of marginalized voices, the forces that push these campaigns toward conformity with the interests and priorities of hegemonic groups and governmental institutions remain

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[143] Handler (1992).
[144] Ibid, 720.
[145] Ibid, ibid.
[146] Crenshaw (1991).

powerful.[147] This observation can be supported by a bulk of studies in social movement literature showing how social movements' organizations (SMOs) operating at the national and state levels are increasingly compelled to align themselves with dominant institutional and ideological forces.[148] This greater dependency stems from the increasingly competitive multi-organizational environment wherein these organizations compete over the scarce resources (both symbolic and material) required for attracting media attention to their cause and for inducing legislators and state bureaucracies to sponsor their policy proposals. For example, studies of the dynamics between different SMOs within a social movement show that, since these organizations often draw from the same pool of philanthropic, volunteering and governmental resources, they are inclined to adapt their mode of framing the problem so as to maximize the media exposure of their campaign. In a media-driven policy context such as anti-crime legislation, these adaptations increase the likelihood that their proposed solution will be endorsed by legislators or become eligible to be supported by governmental funding schemes.[149] Thus, the fecundity of 'law and order' as an issue of media obsession and frenzy legislative reforms not only provided policymakers with new incentives to endorse the anti-hate crime campaign. It also impelled black activists to prioritize the problem of victimization, and to insulate it from other symptoms of racial inequality, in order to frame it in a way which conforms to the representational logic of media and political representations of crime.

D3. The Institutional Underpinnings of Black Mobilization around the Problem of "Hate Crime": The Perils of Single-Issue Mobilization around Crime at the State and National Levels

As Lisa Miller has recently showed, single-issue organizations mobilizing around the problem of crime at the state and national levels are particularly prone to adopt collective action frames which reflect the electoral interests of legislatures and the administrative priorities of criminal justice institutions.[150] As Miller demonstrates, the salience of crime as an issue of intense mobilization at all three levels of American governmental system (but

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[147] Cf. Marcuse (1986)[1964].

[148] This issue has been particularly emphasized by the resource mobilization approach to the study of social movements. See: Zald and McCarthy (1994).

[149] See Herbert Haines' fascinating study of the competition between radical and mainstream strands in the black movement of the 1960s, and in the post-1970s anti-death penalty movement. Haines (1988); (1996).

[150] Miller (2008).

especially at the state and national levels) generates a systematic bias in favour of repeat players, and excludes from the policymaking process the perspectives of citizens living in the closest proximity to crime, as these usually lack the organizational resources or the professional capacity to mobilize at the state and national levels.[151] As crime policy is increasingly shaped by legislative agendas that are geographically and psychologically distanced from the realities of victimization and crime enforcement as experienced by poor minority groups, even "pro-minority" reforms are likely to be framed in a way which reproduces the dominant cultural forms of contemporary politics of crime, e.g. the zero-sum-game formula through which victims' rights and public safety are believed to be sustained through the infliction of harsher penalties on offenders.[152] This zero-sum-game formula then serves to obscure the highly intricate manner in which local communities in crime-ridden urban areas experience the problem of crime. These communities suffer pervasive rates of victimization but also from the collateral damage caused by mass incarceration to spouses, mothers, children, and ex-prisoners.[153] As Glen Loury observes, "the young black men wreaking havoc in the ghetto are still 'our youngsters' in the eyes of many of the decent poor and working class black people who are often their victims...for many of these people the hard edge of...retribution is tempered by sympathy for and empathy with the perpetrators".[154] Members of these communities are therefore less likely to support harsh penal measures, as they are all too aware of the tendency of excessive imprisonment to reinforce (rather than eliminate) both crime levels and other forms of social harm.[155]

Miller's account implies that, ironically, the proliferation of the anti-hate crime campaign on the agenda of state and national legislatures has impeded the ability of interest groups mobilizing on behalf of poor black communities at the local level to initiate more pragmatic and holistic responses to the problem of minority victimization. This observation is particularly unfortunate given the fact that, as shown by Broad's and Jenness' analysis of the early stages in the campaign of the gay community against homophobic violence, by the 1970s, the organizational infrastructure for mobilization around problems of minority victimization at the local level started to gain ground.[156]

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[151] Ibid, 6.
[152] Ibid, ibid.
[153] Chesney-Lind and Mauer (2003); Roberts (2003: 1281-1297); Western (2006: chapter 6).
[154] Loury (1995: 301-302).
[155] Clear (2009).
[156] Broad and Jenness (1997: chapter 3).

Kristin Bumiller has depicted a similar (and concurrent) trajectory in the development of feminist mobilization around the problem of domestic violence.[157] In the 1970s, feminist activism in this field was dominated by grassroots and local organizations which focused on establishing shelters for battered women and rape crisis centres. As her study shows, from the early 1980s onwards, advocacy organizations have increasingly focused on incorporating feminist concerns into the institutionalized schemes of welfare and criminal justice bureaucracies. Among other things, this focus led to the introduction of excessively harsh penal policies (e.g. "no drop" and mandatory arrests) and to the enhancement of the interventionist capacities of welfare bureaucracies in battered women's lives (with markedly disparate effects across racial and class lines).[158]

As the terrain of "pro-minority" criminalization policymaking becomes dominated by single-issue organizations concentrating on lobbying for the introduction of longer and more determinate sentences by state and national legislatures, these campaigns appear more successful in generating high-profile legal reforms. However, their success in generating policy reforms that are suitable to ameliorate the scale of victimization among the most socio-economically marginalized segments of these minority groups seems questionable. Moreover, given the highly inflexible structure of sentencing enhancement laws, it is arguable that hate crime policies might hinder the development of more suitable responses to minority victimization at the community level. For example, it is likely that, given the formal and informal constraints posed by sentencing enhancement laws on judicial discretion,[159] courts have been less likely to make room for the development of restorative justice and alternative models of community-based dispute resolution that seek some type of reconciliation between victim and offender. The de-formalization of the restorative justice model facilitates the personalized encounter between the victim and her harmer.[160] This might provide a more suitable platform for facilitating the victim's recovery and for reducing the perpetrator's likelihood of reoffending.[161] Indeed, studies of experimental uses of restorative justice mechanisms for tackling inter-group violence at the community level have provided evidence of the positive performances

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[157] Bumiller (2008).
[158] See also Crenshaw (1991: 1262-1265); Mills (2003); Coker (2004).
[159] Abrahamson (et al, 1994).
[160] Braithwaite (1989); Christie (1977).
[161] Dubber (2002: 167).

of such processes in facilitating these goals.[162] The arrested development of restorative justice mechanisms for tackling "hate crime "illustrates the tendency of contemporary American crime policy to prevent actual victims from influencing the administration of their case insofar as their preferences do not conform to and reaffirm the ultra-punitive creeds of professed "pro-victim" ideology.

In the next section, I move to analyze the processes of framing through which the political meanings of the problem of black victimization have been reconstructed by the anti-hate crime campaign. This examination will show how the structural constraints imposed by the organizational and institutional determinants discussed above inhibited the success of this campaign in illuminating the links between the problem of black victimization and related patterns and structures of racial inequality.

[162] Coates (et al, 2006).

E. The Ideological Underpinnings and Implications of the Framing of "Hate Crime" in the Context of Racial Justice

Justifications of penalty enhancement hate crime laws attempt to establish a twofold proposition. First, they assert that "hate crime" is different from – and more grievous than – "ordinary crime". Second, they contend that infliction of longer and more determinate sentences on bigotry-motivated perpetrators would better serve the general aims of punishment (including, deterrence, retribution and incapacitation). As Heidi Hurd and Michael Moore have shown, competing arguments on why it is justified to inflict harsher penalties on bigotry-motivated offenders reflect broader controversies in normative criminal theory regarding the parameters which determine the relative gravity of offences (e.g. harmfulness vs. culpability) and the social goods which punishment is believed to be able to advance (e.g. prevention of future harm vs. conveying moral disapproval of the offence).[163] In this section, I will offer a critique of one of the most influential frames for justifying hate crime laws, namely, justifications predicated on the harm principle. Proponents of penalty enhancement hate crime law have put forth two distinct (albeit complementary) theses regarding the aggravated harmfulness of "hate crimes". The first thesis provides that the nature of the injury sustained by the immediate victim of "hate crime" exceeds the harm caused by a parallel crime – in the absence of biased motivation.[164] The second thesis stresses that, independently of its impacts on the immediate victim, "hate crime" (unlike "ordinary crime") produces palpable harm on the broader target community to which the victim belongs.[165] On the basis of these theses, various agents taking part in constructing the meaning and legitimacy of hate crime laws (including, scholars, advocacy organizations, judges, and legislatures) have justified the need to install penalty enhancement mechanisms in order to reflect the aggravated harmfulness of such conducts.

The arguments which will be criticized in this section were presented in order to rationalize a particular policy reform, rather than with the aim of elaborating a full-fledged theory of the role of the State in minimizing social inequalities. However, because public debates over hate crime policy serve as a salient site in which American society deliberate on questions of race, equality and justice, these influential arguments

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[163] Hurd and Moore (2003: 1082).
[164] Lawrence (1993: 323).
[165] Lawrence (1999: 41-42).

played a focal role in reshaping the racial consciousness of American society in the post-civil rights era. The inquiry offered in this section attempts to decipher the political messages which legal and political discourses of hate crime produce in order to probe their ideological functioning within late-modern American politics. What are their implicit assumptions regarding the way in which the State can and ought to minimize the problem of minority victimization? How do they portray the nexus between current patterns of black victimization and broader patterns of racial inequality in contemporary American society? What do they suggest about the relationship between current trends in American race relations and earlier chapters in the nation's racial history? Do they displace more useful frames for thinking about these questions?[166]

E1. A Critique of the 'Direct Harm' Rationale of Hate Crime Laws

The proposition that "hate crime" causes greater psychological trauma and emotional harm to the victim herself provides a common justification for penalty enhancement laws.[167] In its landmark decision upholding the constitutionality of penalty enhancement hate crime laws (*Wisconsin v. Mitchell*), the Supreme Court endorsed this rationale as the major ground which authorizes the State to penalize bigotry-motivated conducts.[168] The persuasiveness of this conventional rationale depends on two main conditions. The first concerns its empirical credibility, a question which remains in dispute. While some empirical studies found that the traumatic effects suffered by victims of "hate crime" were similar to those suffered by victims of comparable violent assaults,[169] others have supported the 'aggravated harm' thesis.[170] Second, as Heidi Hurd and Michael Moore have argued, even if we accept the claim that a larger than average proportion of victims of hateful violence suffer greater emotional harm, there remains the question of whether this finding vindicates a blanket enhancement of penalties for all instances of such violence or simply requires the imposition of harsher penalties in those specific cases in which aggravated emotional harm had been proved.[171] The normative and policy

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[166] It should be noted that, although harm-based justifications arguably constitute the most influential rationale of hate crime laws, it would be insightful to inquire into the ideological assumptions and implications of other rationales as well. I will not be able to pursue this line of inquiry here, mainly due to considerations of scope and focus.
[167] Hurd and Moore (2003: 1085-1093).
[168] Wisconsin v. Mitchell, *508 U.S. 476* (1993).
[169] E.g. Barns and Ephross (1994).
[170] E.g. Levin and Mcdevitt (1993).
[171] Hurd and Moore (2003: 1088).

dilemmas which arise while choosing between these two models should not be considered in the abstract. One of the main considerations which should be taken into account is the way in which each of these models shape the structure of the criminalization processes through which instances of interracial violence are tackled by the criminal justice system. As I will show in section F of this chapter, the statutory imposition of penalty enhancement (vis-à-vis individualized consideration of the emotional harm caused to the particular victim as an aggravating factor throughout the sentencing process) considerably increases the control of prosecutors on the outcomes of the criminalization process. This form of institutional design, I will argue, is ill-suited for minimizing the likelihood of discriminatory exercise of discretion by the criminal justice system. It increases the risk of disparate sentencing outcomes across racial and class lines.

At this stage of my argument, however, our discussion focuses on probing the political underpinnings and ideological functions played by these justifications. Assuming the validity of the claim that "hate crimes hurt more", I wish to take issue with the proposition that a sentencing enhancement arrangement provides the ultimate remedy for addressing the aggravated harmfulness of "hate crimes". My critique will take its cue from Wendy Brown's observations about the perils inherent in the construction of political identities and "pro-minority" reformist agendas around the image of the victimized political subject.[172] According to Brown:

> This effort, which strives to establish racism, sexism, and homophobia as morally heinous in the law, and to prosecute its individual perpetrators there...delimits a specific site of blame for suffering by constituting sovereign subjects and events as responsible for the "injury" of social subordination...This effort casts the law in particular and the state more generally as neutral arbiters of injury rather than as themselves invested in the power to injure...in its economy of perpetrator and victim, this project seeks not power or emancipation for the injured or the subordinated, but the revenge of punishment, making the perpetrator hurt as the sufferer does.[173]

Against the individualistic and penal-centred undercurrents of the 'direct harm' rationale of hate crime laws, I would argue that it is more accurate to depict the African-American

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[172] Brown (1995).
[173] Ibid, 27.

victim of racist violence as placed at the receiving end of a broad array of social and political processes which shape widespread racist norms and breed the criminogenic conditions in which such norms are likely to be expressed through acts of personal violence. Such a contextualization would seek to identify the various ways in which the State is complicit in the facilitation of such harms (even if, ultimately, they are mediated by the wrongful actions of an individual perpetrator). In the specific historical context in which hate crime legislation emerged (post-1980 American politics), it is important to consider how hegemonic State-sponsored projects such as the retreat from redistributive welfarism or the proliferation of racialized 'law and order' political rhetoric and policymaking have played a role in fomenting the conditions which exacerbate blacks' disproportionate vulnerability to criminal victimization. Let us now briefly consider these questions.

As we saw in section C2 of this chapter, it has been argued that two of the dominant discourses which boosted the rise of the New Right in the 1980s gained political momentum by mobilizing popular resentment to the furthering of racial egalitarian reform. The assault on the Great Society vision,[174] and the focus on restoring 'law and order' in the wake of the racial riots of the late 1960s,[175] have re-couched traditional racial stereotypes through the coining of new "code words" (such as "the culture of poverty" or "urban crime"). Granted, the political syntax of these discourses was primarily aimed at circumventing political correctness dictates (while engaging in the mobilization of popular resentment of civil rights reforms) rather than at reviving traditional forms of white supremacist political consciousness. Nevertheless, the wide circulation of these discourses provided a wellspring of stereotypes and myths which serve hate groups for articulating and legitimating their antipathies toward racial and ethnic minorities. For example, ethnographic studies of Klan subculture have shown that images of the "impertinence" of African-Americans (which loomed large in mainstream political critiques of the putative tendency of welfare policies to perpetuate the "culture of poverty") are widely used in current justifications of the recourse to vigilantism.[176]

The rolling back of the welfare state has played a detrimental role in exacerbating the socio-economic conditions which make African-Americans more likely to become victims of crime (whether intra-racial or inter-racial). Because of the concentration of African-

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[174] Gilens (1999).
[175] Beckett (1997: chapter 3); Flamm (2005); Murakawa (2008).
[176] Perry (2003: 297).

Americans as low-skilled workers in labour-intensive industries, they have been at the receiving end of the processes of de-industrialization which thrived in the post-1970s American economy.[177] Pace neoliberal mythology, these changes were not brought about by the 'invisible hand' of market forces but by deliberate policy choices. They were facilitated and accelerated by large-scale policy reforms which deliberately dismantled the mechanisms of economic regulation (most importantly, in the context of African-Americans, regulation of low-wage labour markets) and the welfare schemes which provided a minimal measure of social security for lower socio-economic stratums. The neoliberal turn in American public policy can therefore be charged with buttressing the processes of economic and social marginalization which rendered a large segment of the black population increasingly vulnerable to social and to physical insecurity. Over the last decades, various conditions associated with the production of criminogenic effects have worsened in black ghettoes (including, joblessness; rates of non-marital childbirth; rates of school dropouts; and delinquency among adolescents).[178] As a result, recorded rates of poverty and crime among African-Americans had soared. Between the 1970s and 1980, the proportion of blacks living in extreme poverty areas had doubled (by 1980, it amounted to 40 percent of the black population).[179] Although rates of victimization have been higher for blacks than for whites at least since the 1950s, the figures have become increasingly lopsided since the late 1970s. For example, while rates of death from firearms among whites remained stable between 1984 and 1988, for black males it more than doubled during this period.[180] The lifetime risk of being murdered is one in 21 for black men, compared with one in 141 for white men.[181] Today, blacks' lifetime risk of being killed is double that of American servicemen in World War II.[182]

By constructing a putative dichotomy between "hate crime" and "ordinary crime", the anti-hate crime campaign failed to locate the problem of interracial victimization of African-Americans as an integral component within this broader context of the relationship between socio-economic marginality and vulnerability to victimization. Patterns of "hate crime" are believed to be only loosely related to such patterns of socio-economic marginality, not least, due to the strategic focus of this campaign on highlighting sensational

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[177] Wilson (2009: 9).
[178] Ibid, 46.
[179] Sampson and Wilson (1995: 42).
[180] Ibid, 37.
[181] Ibid, ibid.
[182] Kennedy (1998: 20).

cases of white supremacist terror. However, an examination of the statistical data of recorded "hate crimes" reveals an entirely different picture. In the most populous American cities, the lion's share of recorded incidents involve violent conflicts between racial and ethnic minorities in poor urban areas, where fierce competition over scarce occupational and residential resources, and gang battles over drug turfs, foment fierce racial and ethnic frictions.[183] For example, in Los Angeles, Latino-Americans composed 71 percent of those prosecuted in 2007 for "hate crimes" against African-Americans (who comprise just 9 percent of the population in that county but were the victims of 58 percent of recorded "hate crimes" that year).[184] Of recorded "hate crimes" against Latino-Americans, blacks constituted 56 percent of those prosecuted. Only 17 percent of recorded hate crime cases involved white perpetrators.

The dichotomy between "hate crime" and "ordinary crime" obscures the extent to which both black-on-black violence and Latino-on-black violence seem to be rooted in shared criminogenic sources. These sources are associated with the destabilizing impact of the accelerating polarization of the labour market, and the disinvestment in welfare institutions, on levels of poverty, joblessness and social isolation.[185] These changes had led to the breakdown of community-level controls and to the thriving of gang subcultures in poor urban neighbourhoods in which large segments of ethnic and racial minorities reside.[186]

The remedy to these patterns of interracial victimization is very unlikely to be found in determinate sentencing reforms, as the dominant frame of hate crime policy insists. In fact, the proposed solution ("tougher penalization") provides one of the most momentous sources of the problem. American jails are increasingly rife with racial segregation,[187] grossly overcrowded and violence-ridden, and are ill-equipped to provide offenders with suitable skills for rehabilitation and reintegration. While racial-ethnic conflicts can be repressively contained within prisons' walls, the prison has come to play such a central role in shaping ghetto street culture (what Wacquant conceptualizes as "the wedding of the prison and the ghetto into an extended carceral

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[183] Perry (2001: 119-135).
[184] Figures are drawn from the 2007 Hate Crime Report issued by Los Angeles County Commission on Human Relations. http://humanrelations.co.la.ca.us/hatecrime/data/2007%20Hate%20Crime%20Report.pdf. These figures have been largely similar to those reported in previous years.
[185] Bourgois (1996); Wacquant (2008: 119-132).
[186] Olzak (et al, 1996); Green (et al, 1998).
[187] Bosworth (2009: 87).

mesh")[188] that its patterns of intense racial-ethno enmity are pronounced in the escalation of gang battles for control of drugs, the rackets and turf in poor urban neighbourhoods.

The focus of the anti-hate crime movement on prioritizing the mobilization of penalty enhancement exemplifies the way in which, as argued by Lisa Miller, the structure of American politics of crime "reinforces existing problem definitions and policy frames into which existing groups can easily fit their claims".[189] However, while the suitability of penalty enhancement reforms to alleviate the victimization of African-Americans in urban ghettos seems meagre (at best), this campaign provides legislatures with an effective instrument for manipulating the political meanings of these forms of victimization. Such de-contextualization is effected by highlighting the heinous character of sensational cases which attract obsessive media attention and de-focusing the role of structural socio-economic forces in shaping actual patterns of victimization. In the meantime, the socio-economic pathologies which breed violent conflicts between racial and ethnic minorities are left intact, while political pressures to "do something" about "hate crime" are contained through symbolic acts of "zero tolerance" lawmaking. In any event, it is clear that the numerous forms of racially-skewed harm brought about by the investment of the State in "wedding of the 'invisible hand' of the deregulated labour market to the 'iron fist' of an intrusive and omnipresent punitive apparatuses"[190] remained under the radar of the anti-hate crime campaign.

E2. A Critique of the 'Vicarious Harm' Rationale of Hate Crime Law

Penalty enhancement hate crime laws have also been rationalized by a second type of harm-based justification. According to this rationale, "hate crimes" harm not only the direct victim of the criminal act. They also traumatize and stigmatize all other members of the minority group to which she belongs.[191] Accordingly, it is argued that penalty enhancement laws are required in order to incorporate these collateral harms within the set of interests

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[188] Wacquant (2001: 117).
[189] Miller (2008: 11).
[190] Wacquant (2001: 97).
[191] Greenawalt (1993: 627); Lawrence (1994: 345-6); Lawrence (1999: 41-42).

which the legal sanction reinforces. This rationale was accepted by the courts in various cases in which the constitutionality of penalty enhancement laws was upheld.[192]

The salience of the 'vicarious harm' argument in contemporary debates about the appropriate legal responses to racist victimization echoes the new forms of political mobilization around the symbolic figure of the Victim, as described above (section B3). As David Garland has argued, "the symbolic figure of the victim has taken a life of its own...the victim is now...a much more representative character, whose experience is taken to be common and collective".[193] "It is as crime victims", Jonathan Simon observes, "that Americans are most readily imagined as unified; the threat of crime simultaneously de-emphasizes their differences and authorize them to take dramatic political steps".[194] In this context, the 'vicarious harm' argument serves as a medium through which the agonizing experiences of individual black victims are framed as representative of the collective grievances of the black community (and indeed, of other minority groups mobilizing around the problem of identity-based victimization). Implicitly, such framing serves to reassure liberal public opinion that the new civic ethos build around the symbolic figure of the Victim is not inherently biased against African-Americans. This ethos, it is implied, can also serve as a vehicle for constructing political solidarities which are unbounded by conventional partisan divides over racial issues.

In particular, the recent proliferation of the 'vicarious harm' argument was facilitated by broader discursive shifts which took place in the functioning of the harm principle within legal and policy debates. As Bernard Harcourt has shown, the harm principle, which has traditionally served as a negative constraint on the State's power to criminalize (by means of excluding certain categories of activities from the legitimate sphere of legal intervention),[195] has been playing the very opposite function in post-1980s jurisprudence and politics of crime.[196] Paradoxically, the harm principle has become a powerful rhetorical tool whereby social movements and legislatures advocate the need to outlaw forms of conduct which were permissible hitherto by means of illuminating their potential or actual harmfulness. One of the main facilitators of this

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[192] See, e.g. *State v. Plowman*, 838 P.2d 558 (1992) in which the Oregon Supreme Court upheld a sentencing enhancement hate crime statute.
[193] Garland (2001a: 11).
[194] Simon (2007a: 75).
[195] Mill (1979); Hart (1963); Feinberg (1988).
[196] Harcourt (1999).

trend was the tendency to blur the distinctions between the harms suffered by the immediate victim and the more intangible harms putatively suffered by the wider community (the latter were hitherto incorporated within the concept of 'public interest' rather than being perceived as self-standing grounds for criminalization). The 'vicarious harm' rationale exemplifies this trend. It thus raises important questions regarding the pitfalls inherent in the current tendency to use victimization as a frame through which the interests of minority groups are being defined and legally codified. Similar questions have been discussed, for example, by feminist critics of Catharine MacKinnon's focus on sexual victimization as a prism through which the collective experiences of women can be elucidated, as well as of her inclination to advocate the introduction of new regimes of legal regulation as a putative solution to such harms.[197]

Despite its current political salience, there are several grounds for contesting the empirical validity, normative persuasiveness and strategic usefulness of the 'vicarious harm' argument in mobilizing racial egalitarian claims. The empirical validity of the claim that "hate crime" incidents produce levels of fear among minority communities which are significantly higher vis-à-vis those experienced by the larger population in the wake of comparable violent incidents remains disputable.[198] Moreover, it seems that attempts to ground the justifiability of hate crime policies by pointing to the elevated fears of targeted communities might be criticized for unwittingly exacerbating the severity of the very problem they purport to solve. As a bulk of criminological literature indicates, highly publicized and politicized anti-crime crusades do not necessarily reduce levels of public anxiety.[199] They might also fan public fears and increase the subjective sense of insecurity by "scattering the world with visible reminders of the threat of crime".[200] Even if we are convinced by the claim that "hate crimes" are likely to incite a heightened sense of vulnerability to crime among members of targeted communities, it does not necessarily follow that racial and ethnic minorities would readily support penalty enhancement laws. Studies comparing racial differences in attitudes toward crime policies have demonstrated that African-Americans are less likely to support harsh penal measures and are considerably more critical of the suitability of "tough on crime"

[197] Brown (1995: 128-134); Halley (2008: 41-58).
[198] Hurd & Moore (2004: 1091).
[199] For some recent examples, see Crawford (2007: 899).
[200] Zedner (2003: 163). Elsewhere, I have argued that this problem is not unique to the hate crime campaign, but was also noticeable in various other recent campaigns of "pro-minority" criminalization. See Aharonson (2010: 20-22).

measures to provide safety and security.[201] As noted above, this scepticism is deeply rooted both in African-American history, as well as in present-day encounters with the criminal justice system. As Gunnar Myrdal observed in the mid twentieth century: "The Negros...are hurt in their trust that the law is impartial, that the court and the police are their protection...they will not feel confidence in, and loyalty toward, a legal order...which they sense to be inequitable and merely part of the system of caste oppression".[202] Given the exacerbation of racial disparities in incarceration throughout the last decades, it is unsurprising that the legitimacy of the criminal justice system remains widely contested among African-Americans today.[203] In light of the persistent use of racial profiling and other forms of racially-skewed crime enforcement, the disinclination of African-Americans to support "tough on crime" crusades also reflect their recognition that they are particularly vulnerable to being over-targeted even by policies which appear to be colour-blind or progressive. As we will see in section F1, these concerns are not groundless.

Given these challenges, it seems that the 'vicarious harm' argument gains much of its weight in contemporary policy debates from its effective emphasis on the parallels between present-day instances of white supremacist brutality and the legacy of lynching, Klan terror and slavery. This argument implies that the willingness to enact firm penal responses to "hate crime" serves as a litmus test of the willingness of contemporary American society to repair the racial wounds which agitated the nation in the past. In particular, public belief in the existence of parallels between contemporary and historical forms of victimizing African-Americans stems from the tendency of the media to focus on appalling yet relatively rare cases of ritualistic white supremacist terror. Such, for example, was the atrocious 1998 murder of James Byrd Jr., a 49 years old black man who was chained to the back of a pickup truck by his neck and dragged for miles over rural roads by three white supremacist perpetrators. The media resonance of such cases induces public disgust at the appalling nature of "hate crime", and, in turn, boosts popular demands for the introduction of harsher penal responses. [204] As David Garland notes, "because legislatures – particularly in the USA – are now on a 'war footing' with respect to crime, and exercise direct control over sentencing levels, the system is set up to

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[201] Mears (2003).
[202] Myrdal (1944: 52)
[203] Kennedy (1998: 24-27); Cole (2000: 11-12).
[204] For a sympathetic justification of hate crime laws as a legitimate as well as warranted form of expressing this sense of public disgust, see: Kahan (1998).

produce an instance response".[205] Unsurprisingly, the murder of James Byrd, Jr. has been emphasized by proponents of sentencing enhancement hate crime laws. As part of a wider trend in which new criminal laws are named after victims whose injuries been at the centre of immense media attention (e.g. Megan's Law),[206] Texas passed the James Byrd Jr. Hate Crime Act in 2001 and Congress had recently enacted the Mathew Shepard and James Byrd, Jr. Hate Crime Prevention Act. These laws provided state and federal agencies with new enforcement powers (which, as I will show in section F1 of this chapter, expose African-American and Latino-American perpetrators to new risks of selective over-targeting by these agencies, an issue which was entirely elided from the public debate which led to the enactment of these "pro-black" reforms).

However, in this context, too, when we take a sober look at the figures of recorded "hate crimes", it becomes clear that the focus on extraordinarily cruel cases such as Byrd's murder distorts public understanding of the actual patterns of interracial violence prosecuted and penalized under these statutes. We have already discussed the fact that African-American and Latinos constitute the vast majority among perpetrators of recorded "hate crimes". It should also be noted that the majority of prosecuted cases of "hate crime" do not involve physical assaults (but rather low-level offences such as vandalism).[207] On the basis of these figures, it is arguable that, ironically, the success of the anti-hate crime movement in mobilizing popular and political concern of the problem of white supremacist violence has crystallized in an historical epoch in which such violence has become ever less central as an instrument of drawing and enforcing the 'colour line'. The fourfold genealogical perspective developed in this dissertation provides a useful vantage point from which we can demonstrate this claim.

As shown in the second and third chapters of this study, up until the 1930s, the victimization of African-Americans was facilitated by the demographic concentration of virtually the entire black population in the Rural South; the lack of employment opportunities for blacks outside the agrarian Southern economy; and the operation of political and legal mechanisms which legitimated and reinforced the inferior conditions of African-Americans through an unequivocal white supremacist ideology. The

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[205] Garland (2001a: 133).
[206] Simon (2000: 1136).
[207] Jacobs (2003: 422).

'vicarious harm' argument seems accurate in describing the centrality of white-on-black violence in constituting the collective experiences of African-Americans in the slavery and Jim Crow periods. Such violence, I have shown, operated in tandem with various official mechanisms employed by Southern authorities for disciplining individual deviations from white supremacist behavioural codes, and for restricting blacks' freedom of movement and association so as to reinforce their inferior economic and political status. The withdrawal of protection from African-American victims was openly rationalized by dominant political ideologies which affirmed the legitimacy and constitutionality of using racial categories as grounds of differential legal treatment.

However, the 'vicarious harm' argument seems less accurate as a description of the role played by racist violence in constituting the social, economic and political status of African-Americans from the mid twentieth century onwards. Already in the 1950s, the effective campaigning of the Civil Rights Movement around the problem of black victimization had spotlighted forms of violence which were not widely experienced in the North (i.e. obstruction of blacks' access to desegregated public school by white supremacist mobs). As argued in chapter 4, this strategic focus facilitated the Movement's success in spurring the reform of federal civil rights policy and indeed in precipitating the abolition of Jim Crow. However, by overplaying the extent to which such overt forms of white supremacist terror represented the collective conditions of African-Americans, this campaign failed to mobilize a solid political and social recognition of the illegitimacy of the systemic mechanisms of social and political exclusion which prevailed in the North (as these did not take the form of overt extralegal reinforcement of white supremacist norms).

In contemporary American society, the validity of the 'vicarious harm' argument becomes increasingly questionable. Since the 1970s, the class structure within the black community has polarized dramatically, "with the black poor falling further and further behind middle- and upper-income blacks"[208] As Loïc Wacquant notes, "the ability of middle-class blacks...to avail themselves of the new occupational opportunities created by affirmative action programs and to protect their offspring from downward mobility contrast sharply with the basic inability of the ghetto poor to enter the wagelabour economy and to secure the means to raise themselves and their families

[208] Wilson (1980: 152).

out of persistent poverty".[209] Inevitably, because of the symbiosis between poverty and crime, this polarization is also reflected in a greater cross-class differentiation *among blacks* with regard to their vulnerability to criminal victimization. To emphasize, racial identity did not evaporate as a factor which affects individuals' likelihood of becoming a victim of crime. Indeed, as noted above, blacks continue to be overwhelmingly more likely to be victimized than whites, and in some categories (including murder) racial disparities have grown dramatically since the 1970s. However, as argued by William J. Wilson, at root, these figures reflect the demographic concentration of large segments of the black population in poor and isolated urban ghettoes blighted by extreme rates of poverty, joblessness, dysfunctional schools, and single-parent households.[210] As in many other contexts, black-white disparities in victimization might actually reflect class disparities.

Placed within this broad historical context, it might be argued that the anti-hate crime campaign serves to highlight forms of victimization which have become less consequential in shaping patterns of racial inequality *as such*, and, at one at the same time, diverts public attention from the most prevalent patterns of victimization to which African-Americans are exposed. This ideological effect seems to exemplify Jonathan Simon's observations that "the dangers of 'governing through crime' are also those of unification within forms of subjectivity that are themselves too ungrounded in history or politics to generate effective formation of democratic will".[211] The salience of the anti-hate crime campaign in shaping public perceptions of experiences of victimization among African-Americans serves to obscure the fact that four-fifths of recorded violent crimes in the US are committed by a person of the same race as their victims.[212] This fact provides a troubling symptom of the pervasiveness of racial segregation in American society, but it is usually obscured in light of the tendency to construct the symbolic image of the Victim in ways which reflect the anxieties of white, middle class, suburban citizens.[213]

Within this context, the anti-hate crime campaign displaces a wider agenda of progressive mobilization which would have presented victimization rates among African-Americans (not only when inflicted by white supremacist terrorists) as a telling

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[209] Wacquant (1989: 9).
[210] Wilson (2009: 27).
[211] Simon (2000: 1132).
[212] Kennedy (1998: 19).
[213] Simon (2000: 1137).

symptom of their disproportionate vulnerability to social harm more generally, a pattern which can be shown to correlate with the racialized class structure in American society.[214] The fact that this path was not vigorously taken by black activists seems to be rooted not only in the structural constraints which American politics pose on the development of class-based politics of victimization. It also reflects the reluctance to spotlight the problem of black-on-black victimization in light of the peril that such a focus would adversely reinforce public stereotypes of black dangerousness.[215]

Hate crime discourses seek to circumvent this difficulty by means of highlighting forms of victimization which are likely to be censured even by whites who oppose redistributive welfarist reforms or dispute the discriminatory nature of other types of racially-skewed enforcement patterns (e.g. racial profiling, which is often rationalized as a prudential response to blacks' higher rates of criminal activity).[216] However, this strategic circumvention keeps public opinion oblivious to the patterns of violence which have the most destructive impact on the most marginalized groups within the black community.[217] Perhaps more importantly, by failing to challenge the marginalization of *class* in current political debate about crime, discourses of hate crime leave intact the ideological mechanisms which construct the legitimacy of the policy frameworks that produce such patterns of racial polarization.

To sum up, in this section, I offered a critique of some of the most salient arguments which were accepted as justifying grounds for the introduction of hate crime laws. In particular, I have showed that these arguments have framed the political meanings of – and required solutions to – the problem of black victimization in a way which reproduced the ideological creeds of contemporary "tough on crime" thinking. By accepting these creeds as appropriate for representing the meanings of the problem of black victimization, anti-hate crime campaigners were able to gain success in initiating what arguably amounts to the most visible project of "pro-black" criminal justice reform of our time (or even of entire American history). However, I

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[214] Sampson and Wilson (1995).
[215] In *The Boundaries of Blackness*, Cathy Cohen has analyzed a similar dilemma, concerning the negative impacts of black mobilization around the problem of African-Americans' disproportionate rates of infection by AIDS out of concern of the stigma-reinforcing effects which such campaigns might entail. Cohen (1999: chapter 2).
[216] On constitutional and empirical difficulties in proving the discriminatory nature of racial profiling, see: Banks (2003: 580-587).
[217] Kennedy (1998: 19).

have shown that such cooptation into the broader discursive terrain of populist "tough on crime" policymaking has constrained the success of this campaign in serving as a vehicle of consciousness raising. In particular, in its framing of the sources and patterns of the problem, the campaign had overemphasized remnants of anachronistic systems of racial domination while dissociating contemporary patterns of black victimization from the large-scale demographic and policy structures within which they are embedded. Secondly, in its framing of the required solution to this problem, it mobilized a narrow vision of how the State can and ought to minimize the ordeal of black victims. This vision focuses entirely on the stipulation of harsher and more determinate penalties at the expense of a more holistic representation of the various ways in which non-penal public policies can alleviate the structural conditions which nurture the materialization of such harms.

F. The Implications of Hate Crime Policies for the Enforcement of Crimes Causing Interracial Victimization of African-Americans

The introduction of hate crime laws was intended to improve the performance of the criminal justice system in protecting African-American victims in two main ways. First, by installing mechanisms for controlling discretion throughout different stages of the criminal process, hate crime laws sought to minimize the opportunities for discriminatory exercise of discretion by enforcement agents. Second, by attaching harsher penal sanctions to racist-motivated criminal conduct, hate crime laws attempted to enhance the deterrent effects upon would-be racist perpetrators. Both of these goals sound plausible and well-intentioned in the abstract. However, as I will now move on to show, their achievability has been hampered by the operation of hate crime policies within the institutional and political structures which prevail in contemporary American criminal justice system.

F1. Hate crime and the taming of institutional racism in the administration of criminal justice?

The first declared aim of hate crime laws is to minimize the likelihood that the protection of African-American victims would be inhibited because of discriminatory exercise of discretion by crime enforcement agents. The idea of installing formal mechanisms for governing the exercise of discretion is responsive to a large body of evidence documenting the pervasiveness of institutional racism within the professional culture of policing, prosecutorial,

and judicial institutions.[218] The publication in 1971 of the report *Struggle for Justice*, prepared for the American Friends Service Committee, provided an early influential critique of the extent to which the open-ended structure of indeterminate sentencing processes was susceptible to biased exercise of discretion against African-Americans.[219] Such criticisms had intensified over the following decades. As Michael Tonry encapsulates the common critique, "the capacity of every judge, probation officer and parole board to exercise individualized discretion within broad ranges of authority created nearly limitless risks of contamination of decisions by deliberate racial animus and unconscious stereotyping".[220] Hate crime legislation was advocated as providing a suitable remedy to this problem.

As is often the case, the implementation of hate crime policies has been shaped by institutional dynamics and determinants that were not fully anticipated by proponents of these reforms. In particular, the enforcement of criminal legislation is dependent on the specific way in which the institutional structures within which it is implemented shape the interactions between different institutional actors.[221] Among other things, these structures govern the degree and the manner in which each of the key institutional actors in the administration of crime policy (police officers, prosecutors, and judges) can influence the outcomes of the criminal process. In this context, I would argue, the enforcement patterns of hate crime laws have reflected broader problems which characterize the implementation of determinate sentencing in general.

One of the most illuminating accounts of the way in which the interactions between different crime enforcement agencies shape the outcomes of criminalization processes in the US has been developed by William Stuntz in his seminal article *The Pathological Politics of Criminal Law*.[222] According to Stuntz, the breadth and depth of American criminal law – its tendency to cover an excessive range of activities and to cover the same conducts many times over through different criminal labels – entrusts prosecutors with decisive influence on the outcomes of the criminal process. For Stuntz, "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones".[223]

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[218] Kennedy (1998); Cole (2000); Mauer (1999); Davis (1999).
[219] Garland (2001a: 55).
[220] Tonry (2005: 1233).
[221] Lacey (1995).
[222] Stuntz (2001).
[223] Ibid, 510.

For prosecutors, the breadth and depth of criminal legislation is welcomed, as it widens the range of charging opportunities and thus improve their ability to induce guilty pleas and to gain greater conviction rates. This incentive is particularly significant given the fact that more than 95% of local district attorneys in the US are standing for election.[224] Because of a combination of historical contingencies and structural features of the American constitutional system, the American jurisprudence of crime has evolved in a way which focuses on regulating the trial process, some aspects of policing (e.g. search and seizure) and capital punishment, while refraining from regulating substantive crime definitions, the scale of non-capital punishment and prosecutorial discretion.[225] This state of affairs leaves judges with weak doctrinal tools to counterbalance the impetus of the electoral pressures and institutional dynamics pushing toward over-criminalization and excessive penalization.

The re-penalization of conducts which are already criminalized under generic laws by means of relabeling them as "hate crimes" nests neatly into this structure of over-criminalization and excessive penalization. Hate crime laws shift control over the application of these generic laws from courts to prosecutors and police officers. The exercise of discretion by police officers and prosecutors while deciding whether to classify a particular conduct as a "hate crime" is very loosely constrained, while their decisions pose considerable formal and informal constraints on the exercise of judicial discretion.[226] This observation can be explicated by a succinct analysis of the multi-institutional relations between the key institutional actors who take part in enforcing hate crime laws. As James Jacobs has argued, the processes whereby police officers decide whether to identify a particular event as a "hate crime" are highly speculative. Particularly given the highly politicized and subjective nature of judgments into the perpetrator's biased motivations, these processes can hardly be effectively guided and monitored according to consistent and binding criteria.[227] As in many other instances of determinate sentencing policies, prosecutors are the main beneficiaries from the imposition of statutory restraints over judicial discretion.[228] Because hate crime statutes create separate offences which can be charged in addition to the original offence, they provide prosecutors with a valuable tool for "charge staking", that is, the ability to apply overlapping criminal prohibitions to a particular chain of

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[224] Ibid, 533.
[225] On the weak constitutional regulation of substantive criminal law, see: Dubber (2004); on the weak constitutional regulation of prosecutorial decision-making, see: Bibas (2001); Davis (2007); For a general analysis of how these patterns of over-regulation and under-regulation allocate control over the outcomes of criminalization process between different institutional agents, see: Stuntz (2006).
[226] Abrahamson (et al, 1994).
[227] Jacobs (2003: 412-414). But see Bell (2002).
[228] Bibas (2001).

events and thus to pressurize a risk-averse defendant into pleading to a lesser crime.[229] The power to negotiate the outcome of the case in the shadow of a threat of sentencing enhancement provides a powerful bargaining chip in the hands of prosecutors. Given the fact that the vast majority (nearly 95 percent) of criminal cases in the USA are settled by plea bargain rather than by a jury trial,[230] this weapon might prove particularly consequential in enabling the criminal justice system to clear cases of interracial violence. Given existing patterns of disproportionate targeting of racial and ethnic minorities throughout all stages of the criminal process, and the fact that recorded rates of black-on-white and black-Latino violence far exceed the scale of white-on-black violence,[231] it seems highly probable that the favourable 'charge staking' powers with which prosecutors are provided by hate crime statutes are very often being used (and misused) against black suspects and defendants.

From this perspective, the focus of hate crime policy on restricting judicial discretion seems clearly misplaced, as it concentrates on restraining "the least dangerous branch" of the American criminal justice system (in terms of its tendency to produce disparate outcomes across racial and class divides). Although many studies have documented the pervasiveness of racial disparities in sentencing, it is arguable that judicial decision-making is less prone to be permeated by institutional racism than are prosecutorial and policing practices. Granted, we should not overplay the extent to which the more formalized character of the trial process (vis-à-vis policing and plea-bargaining) as well as the influence of rights ideology on the professional culture of the judiciary preclude courts from exercising discretion in a discriminatory manner. Nevertheless, it seems that the processes which hinder the equal protection of black victims are much more crucially hampered by police[232] and prosecutorial[233] discrimination. The fact that these aspects of the criminalization process were left practically unchecked by hate crime reformers can be traced to their strategic decision to capitalize on the favourable conditions provided by the bipartisan support for determinate sentencing reform, while ignoring the warning signs concerning the racially-skewed application of such policies.

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[229] Goldberger (2004).
[230] Bibas (2001: 1150).
[231] Jacobs (2003: 416).
[232] Skolnick (1993).
[233] Davis (1999: 18).

F2. Hate crime and the reduction of violence against black victims?

At the heart of the debate over the deterrent qualities of hate crime laws rests the question of whether enhancing the penalization of conducts which were already outlawed under generic criminal statutes is likely to produce significantly greater deterrent effects (vis-à-vis those engendered by the original criminal statute). The political currency of determinate sentencing reforms is responsive to the popular belief in the existence of a straightforward negative correlation between crime rates and sanction levels. This popular belief maintains that the stipulation of harsher penalties is likely to reduce the occurrence of the prohibited conduct. However, the empirical literature on the deterrent impact of determinate sentencing reforms portrays a much more intricate picture.[234] The main theoretical puzzle with which this literature grapples pertains to the optimum level beyond which the enhanced threat of penalization fails to amplify the deterrent signal. In particular, both the short-term and particularly the long-term crime reductive impacts of sentencing enhancement policies and of other components of the determinate sentencing reform have been strongly contested by empirical studies. For example, Zimring (et al) compared crime trends in different counties in California following the enactment of its 'three-strikes-and-you're-out' legislation. Noting that this legislation left prosecutors with considerable discretion on whether to apply the 'three-strikes' provision in particular cases, they showed that counties with higher than average use of such provisions did not experience higher levels of crime reduction.[235] Michael Tonry has showed, in a longitudinal examination of crime trends in the five most populous states (in the period 1980-2000), that the introduction of California's 'three-strike-and-you're-out' crusade failed to produce greater crime-reductive effects vis-à-vis other states which did not install such draconian measures.[236] These findings seem to echo Sir William Blackstone's observation nearly 250 years ago: "we may observe that punishment of unreasonable severity...have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity".[237]

In light of this body of evidence, it could be argued that the difficulty hate crime laws have in achieving marginal deterrent effects stem from their being embedded within a broader network of criminal statutes which contain harsh (and often disproportional) penal sanctions. It can be assumed that hate crime laws are likely to make a practical difference

[234] Doob & Webster (2003); Von Hirsch (et al, 1999).
[235] Zimring (et al, 2001: 103).
[236] Tonry (2004: 124).
[237] Blackstone (1979: 4)[1765-1769].

mostly to the enforcement of low-level offences which do not involve physical violence, rather than to those reminiscent of the lynching era which are usually invoked in order to dramatize the urgency of stiffening penal responses.[238] This point can be illustrated by looking at the legal reforms declared in the name of responding to the murder of James Byrd Jr. in 1998. As noted earlier, this horrendous case of lynching served as a catalyst for the expansion of hate crime laws at both state and federal levels. However, the outcome of the trial of Byrd's murderers did not evince a lenient sentencing approach. Two of his killers were sentenced to death and the third to life sentence without the possibility of parole. Thus, symbolic legislative reforms such as the *James Byrd Jr. Hate Crime Act* (enacted in Texas in 2001), as well the *Matthew Shepard and James Byrd Jr. Hate Crime Prevention Act* (enacted in 2009 by Congress), cannot be justified as remedying practical institutional deficiencies which were pronounced in these cases.[239] At the same time, these reforms subjected a wide range of low-level offences to harsher penalties.

The tendency to respond to public outrage in the wake of sensational crimes of extreme brutality by means of adopting harsh penal reforms which also apply to misdemeanours is a well-familiar pattern of late-modern politics of crime.[240] This pattern was exemplified by the 'three-strikes-and-you're-out' crusade which grew out of public outcry against some egregious cases of violent behaviour by habitual offenders yet was institutionalized in a way which predominantly targeted non-violent forms of offending.[241] Markus Dubber's account of the War on Crime, launched in the name of combating interpersonal violence yet predominantly focused on possession offences, reveals a very similar pattern.[242] In an era in which the frontiers of criminality are increasingly open-ended in light of the proliferation of 'zero-tolerance policing', 'broken windows policing' and similar schemes prescribing "getting tough" on petty crime or anti-social behaviour as a central component of crime-reduction efforts,[243] hate crime laws are likely to be used for providing crime enforcement agencies with stricter measures for tackling low-level offences. In this context too, given the disproportionate targeting of racial and ethnic minorities by

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[238] Jacobs and Potter (1998: 89).

[239] Matthew Shepard was murdered by two homophobic bigots in 1998 because of his perceived sexual identity. Because the hate crime statute in Wyoming, where the murder was committed, did not apply to violence on the basis of the victim's sexual orientation, his murderers were indicted under generic homicide laws (not for hate crime). Nevertheless, both were sentenced to two consecutive life sentences without the possibility of parole. "Killer of Gay Student Is Spared Death Penalty", **Los Angeles Times** (05.11.1999, A1).

[240] See, e.g. Simon's (2000) discussion of the case study of Megan's Laws; Garland's discussion of 'acting out' forms of penal lawmaking (2001a: 133).

[241] Zimring (et al, 2001).

[242] Dubber (2002).

[243] Harcourt (2005: chapter 2).

the police, it is likely that hate crime laws are mainly used for administering cases of interracial low-level delinquency. A possible rejoinder to this argument might stress that the tackling of everyday symptoms of racism which are categorized at the lower end of the criminal spectrum is itself a worthy cause.[244] However, this rejoinder does not seem to be supported by the bulk of empirical research on the performance of 'zero tolerance' methods in minimizing the scale of physical violence.[245] For example, it has been shown that habitual offending policies failed to carry discernible crime-reductive effects on either felonies or low-level crimes.[246]

G. Conclusion

This chapter opened with a reference to Stuart Hall's comment on the tendency of the liberal blueprint of racial reform to be trapped by a cyclical affirmation of "what is practical and realistic in the short term...given the current conditions".[247] The discussion in this chapter has shown that the anti-hate crime movement had been vulnerable to the de-radicalizing effect which the mobilization of piecemeal racial reforms within entrenched systems of racial inequality is likely to entail. Like many other campaigns launched under the banner of the politics of recognition, the anti-hate crime campaign had served, in the words of Nancy Fraser, "less to supplement, complicate and enrich redistributive struggles than to marginalize, eclipse and displace them".[248] This campaign has spotlighted the persistence of violent patterns expressing racial stereotypes in contemporary American society. Yet it has failed to link these patterns of violence to broader political and institutional mechanisms which produce the socio-economic marginalization of African-Americans and their unequal treatment by the criminal justice system. The containment of the struggle to ameliorate the plight of black victims within the predominant model of neoliberal penality is highly problematic, as it is this model which has inspired and rationalized the new economic and penal policies which have exacerbated the vulnerability of poor racial minorities to victimization over the last decades.[249]

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[244] Matzuda (1990).
[245] Tonry (2004: chapter 5); Harcourt (2005: chapters 3, 4).
[246] As Zimring (et al, 2001) show, before California's 'Three Strikes' laws took effect, individuals with one or two 'strikes' on their record were responsible for 13.9 percent of all adult felony arrests in Los Angeles, San Diego and San Francisco, the three cities studied. After the law went into effect, that number changed only slightly, dropping to 12.8 percent of arrests; Before 'Three Strikes' legislation came into force, 44.8 percent of all felony arrests involved suspects with any kind of felony conviction on their record - property crimes or more serious and violent offenses. After, that proportion remained essentially the same, 45.4 percent.
[247] Hall (1978: ix-x).
[248] Fraser (2000: 107).
[249] Wilson (1997).

Chapter 6:

Conclusion: "Pro-Minority" Criminalization Reforms – How They Succeed, Why They Fail

A. Introduction

This dissertation has examined the historical evolution of legal responses to the victimization of African-Americans from the slavery era to the present. In particular, it paid attention to the origins, effects and theoretical implications of "pro-black" criminalization (defined as legal regimes introduced with the specific aim of protecting black victims). I have attempted to show that the lessons gained from a study of the way in which the problem of black victimization has been understood and acted upon in earlier phases of American racial history can enrich our understanding of a cluster of timely questions in the sociology of criminalization. In this concluding chapter, I will summarize the major contributions of this study to our understanding of the preventive and symbolic functions of hate crime policies, and of the potential and limits of "pro-minority" criminalization as a vehicle of progressive social change more generally.

In section **B**, I discuss the study's main conclusions regarding the conditions which enabled and constrained the emergence of new regimes of "pro-black" criminalization throughout American history. In section **C**, I summarize of the major conclusions regarding the effects produced by these regimes. The performances of "pro-black" criminalization are analyzed with respect to the two main goals which hate crime laws are believed to advance: a) minimizing the vulnerability of racial minorities to criminal victimization; b) serving as a communicative instrument through which the State recognizes the entitlement of racial minorities to equal protection, and denounces racist norms more generally.[1]

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[1] To clarify, the discussion of the expressive functions of "pro-minority" criminalization have implications on the achievability of both the political and cultural rationales introduced in the first chapter.

B. "Pro-Minority" Criminalization Reforms – Why They Succeed

What are the conditions which enable the emergence of new criminalization regimes which are specifically designed to protect racial minorities? The purpose of posing this question was not to improve our ability to predict future waves of legislative reform in this field. My aim was to advance our critical understanding of the conditions of existence of such legislation in order to consider how these conditions affect its suitability to achieve its two main intended goals: first, to reduce the vulnerability of racial minorities to victimization; second, to erode the legitimacy of discriminatory political and social norms. I developed my thesis in an effort to move beyond the limitations of three conventional theories of the conditions which enable the emergence of "pro-minority" criminalization in general. The first thesis describes the emergence of such reforms as responsive to a "rising tide" of violence against minorities; the second thesis depicts it as a barometer and facilitator of the weakening grip of discriminatory social norms (thus, criminalization reforms reflect increasing social disapprobation of racist, sexist and homophobic forms of conduct which were acceptable hitherto); the third thesis attaches primary importance to the role played by social movements in politicizing patterns of minority victimization and lobbying for the introduction of new penal responses.[2] The explanatory framework developed in this dissertation sought to retain certain elements emphasized by the third thesis. However, I have attempted to show how the strategies of framing and mobilization employed by progressive social movements were themselves shaped by larger structural determinants. I also emphasized that the achievements of these campaigns in initiating policy reforms were dependent on their compatibility with electoral and administrative goals pursued by policymakers and social elites.

The distinctive thesis advanced in this study was that the conditions which enabled and constrained the emergence of "pro-black" criminalization regimes throughout American history were shaped by the interplay between three sets of determinants. First, I examined the extent to which *prevailing political and social structures* made room for effective mobilization around the problem of black victimization. This discussion shed light on the economic, demographic, political and cultural preconditions which enable "pro-minority" criminalization campaigns to gain political momentum. Among other things, I explored the role played by the following

[2] This critique was presented in pp. 11-17 of chapter 1.

determinants in shaping the forms and the outcomes of "pro-black" criminalization campaigns and policies: the functions performed by black labour within the regional and national economic systems; the structure of the regional and national political systems (including, voting patterns and historical shifts in ideological positions over civil-rights issues); prevailing constitutional theories and shifting conceptions of the relationship between state and federal governments; and the impact of demographic patterns (including, urbanization, segregation and ghettoization) on the forms and outcomes of black protest.

The second set of determinants shaping the contours of "pro-black" criminalization policy was associated with the *strategies used by progressive social movements in framing the political meanings of black victimization.* In this context, I explored the patterns of continuity and change in how this problem was represented by the Abolitionist movement, the NAACP, the Civil Rights Movement (which coupled the NAACP legalistic campaign with various forms of grassroots mobilization) and the anti-hate crime movement. I considered how these movements had linked the problem of black victimization with broader problems of racial inequality, and how their strategies of framing and campaigning affected the outcomes of these crusades. This discussion has contributed to our understanding of the motivations and incentives which impel progressive social movements to have recourse to 'the victimization frame' (sometimes, at the expense of mobilizing around other collective action frames which could have make a greater impact on the conditions of the marginalized community). I will discuss my conclusion regarding the distinctive effects which strategic mobilization around 'the victimization frame' engenders in section C2 of this chapter.

The third set of determinants affecting the likelihood of the advent of new regimes of "pro-black" criminalization pertains to *the extent to which such reforms are believed to advance the interests of political and social elites.* I have shown that, throughout American history, the enactment of such legislative reforms was amenable to new challenges of legitimation and coordination with which policymakers and social elites were confronted. In most cases, the passing of such legislation was motivated by efforts to contain demands for racial egalitarian reforms in ways which would not necessitate tampering with powerful electoral and economic interests invested in the preservation of the racial status quo. For example, it chapter 2, I have shown that the introduction of laws penalizing slave abuse in

the antebellum South was responsive to the success of antislavery campaigns in prompting Northern opposition to the "peculiar institution". Among other things, such legislation sought to demonstrate that values of fairness and respect for slaves' human dignity can be accommodated into slave law, and thus to weaken the moral case for abolition. In chapter 3, I have shown that the failure of both regional and national legal systems to devise anti-lynching legislation in the late nineteenth century was rooted in the removal of the electoral and administrative incentives which had impelled the Republican Party and the federal government to invest political capital in such reforms during Reconstruction.

In chapter 4, I have shown that the enactment of "federally protected activities" legislation between 1964 and 1968 was stimulated by the success of the Civil Rights Movement in utilizing the increasing electoral leverage of black voters and the implications of Cold War dictates in order to create new pressures of legitimation on national policymakers. This legislation was found suitable to contain progressive racial protest within manageable ideological bounds because it focused on Southern manifestations of racial brutality. This focus left the more "civilized" yet highly pervasive forms of marginalizing blacks within Northern economy and society virtually intact. Hence, this legislation buttressed the legitimacy of the informal forms of segregation and discrimination prevailing in the North by portraying them as consistent with the nation's professed democratic and meritocratic creeds.

In chapter 5, I have showed that the mushrooming of hate crime laws since the early 1980s was enabled by the crystallization of new electoral incentives which spurred politicians of both major parties to endorse this campaign. In this context, the issue of "hate crime" differs markedly from virtually every other issue on the agenda of criminal justice reform. In an era in which pressures to conform to a "tough on crime" posture have become decisive, legislatures are dissuaded from taking a "pro-black" position in various areas in which legislative intervention is desperately needed to ameliorate racial disparities in crime enforcement (e.g. racial profiling, drug laws).

As stressed by Gunnar Myrdal in *An American Dilemma*, America's racial practices had always posed a fundamental challenge to the credibility of its professed commitment to

the ideals of freedom and equality under the rule of law.[3] In this study, I have shown that the introduction of "pro-black" criminalization reforms was often aimed at reinforcing public trust in these ideals. The stimuli for such reforms was provided by the success of social movements in portraying governmental failure to restrain brutal forms of racist terror as inconsistent with even the most narrow interpretation of American constitutional principles. Because criminalization campaigns focus on the most overtly repressive and obviously repulsive symptoms of racial domination, it has been easier for racial reformers to initiate "pro-black" criminalization reforms even in periods in which public opinion opposed structural challenges to the racial status quo.

For example, in the antebellum period, the paternalistic sentiments of the planter elite found expression in their support of outlawing particular forms of "slave abuse" (denounced as inconsistent with cultural codes of Southern honour) notwithstanding their relentless opposition to Abolitionism. The campaign of the Civil Rights Movement had spotlighted the atrocious measures to which white supremacist mobs resorted in order to preclude African-Americans from realizing their constitutional rights to enrol in desegregated schools and college. This campaign had stimulated Northern criticism of the repressiveness of Jim Crow and increased the pressures on the federal government to introduce more robust measures for combating racial segregation. However, Northern reluctance to eradicate mechanisms of de facto residential and occupational segregation which pervaded the region's economic and social systems remained largely intact. The anti-hate crime campaign focused on appalling reminiscences of lynching and Klan terror (e.g. the 1998 murder of James Byrd, Jr.). It reminded American society of the ugly remnants left by its racist legacy. Unlike the campaigns mobilized by other minority groups while demanding to be included within hate crime laws (most notably, the campaign mobilized by gay and lesbian activists), the idea of imposing tougher penalties on racist offenders won overwhelming bipartisan support from the outset.[4] At the same time, however, political support for socio-economic and due process reforms required for ameliorating the disproportionate rates of poverty and incarceration within the black community remained feeble.

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[3] Myrdal (1944).
[4] Jenness (2001: 301-306).

In all of these cases, "pro-black" criminalization campaigns created a site in which respectable citizens could express their aversion to particular forms of racial domination while turning a blind eye to the structural conditions which made such excesses possible. For governments, the introduction of new regimes of "pro-black" criminalization served to reassure mainstream public opinion that such conducts can be eliminated through the stipulation of tougher penalties. Such acts of criminal lawmaking served to manipulate the political implications of these forms of victimization by obfuscating the extent to which State-sponsored marginalization of African-Americans in the economic and political sphere nurtured the criminogenic conditions within which such violence thrive. As Nicola Lacey has noted:

> Government decisions to criminalize... can score political points by exploiting the ambiguity in the notion of crime...on the one hand, government is constructing law and order problems as *political* issues, to which it is responding; formal legislation thus offers government the opportunity to represent itself as instrumentally effective. At the same time, it can draw on a prevailing discourse of crime as in some sense *pre-political* – that is, as wickedness or ...even pathology[5]

Within this context, the unfolding of new regimes of "pro-minority" criminalization is shaped by (ad hoc) convergence of interests between progressive social movements and policymakers. Progressive social movements have primarily attempted to politicize patterns of minority victimization in ways which would spotlight broader structures of institutional discrimination and social deprivation. Governments and legislatures have mainly sought to contain such protest within manageable political and ideological bounds. The introduction of new "pro-black" criminal offences served this endeavour by appealing to the combination of, on the one hand, the popular belief in the instrumental efficacy of punishment,[6] and, on the other hand, deep-seated popular reluctance to endorse revolutionary racial reforms. Such reluctance was rooted in the internalization of racialized ideologies which portrayed existing social arrangements as basically fair and inevitable.[7]

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[5] Lacey (1995: 14).
[6] Lacey, Quick and Wells (2003: 13).
[7] Fields (1982).

This interpretation of the conditions of existence of "pro-black" criminalization regimes provides a basis for revisiting their suitability to meet their declared preventive and expressive aims. It is to this discussion that I now turn.

C. "Pro-Minority" Criminalization Reforms – How They Fail

Because hate crime laws re-label conducts which had already been punishable under generic criminal offences, the crux of policy debates over their utility revolves around their marginal contribution to the pursuit of criminal law's preventive and expressive goals. Is the enactment of a separate offence which specifies the perpetrator's hateful motivation as a ground for enhancing his penalty likely to achieve better preventive results vis-à-vis those attainable by the generic criminal offence? Is the enactment of such legislation capable of mobilizing firmer social and political commitment to the pursuit of racial equality? I now move to reflect on the contribution of this study to our thinking about these questions. I will also discuss some of the implications for our understanding of similar problems pronounced in the expressive and institutional functioning of "pro-minority" criminalization regimes operating in other contexts of social inequality.[8]

My basic argument will be that the suitability of criminalization to protect and to empower minority groups does not depend on whether it takes the form of specific ("pro-minority") or non-specific (generic) legislation. Rather, it hinges on whether the enforcement of criminal law (specific or generic) takes place within institutional environments capable of subverting prevailing racist, patriarchal and homophobic norms. The conditions in which hate crime laws emerged and have been applied in post-1980s USA prevented it from satisfying this requirement. The future performance of the American criminal justice system in protecting black victims will be primarily determined by forces which are exogenous to that system. Ultimately, it will depend on whether American society will undertake a fuller commitment to enhance African-Americans' social and economic integration. Contrary to the accepted lore (recently

[8] In a forthcoming article (Aharonson (2010)), I have discussed the generic pitfalls of contemporary "pro-black" criminalization policy (including in the field of feminist law and order politics) in more detail.

reiterated by the Obama administration),[9] the investment in expanding hate crime policies will have, at best, a meagre effect as long as the broader institutional and ideological structures which dominate contemporary law and order policy will remain intact.

C1. The Intrinsic Limitations of "Pro-Minority" Criminalization as a Vehicle of Crime Prevention

C1.1. Endogenous Constraints on the Marginal Contribution of "Pro-Minority" Criminalization Reforms to the Protection of Minority Victims

One of the main intended goals of "pro-minority" campaigns is to remove particular institutional arrangements which can be proved to impede the equal protection of minority victims. With the removal of these particular arrangements, we are being assured, the criminal justice system will become better equipped to, and thus more capable of, preventing cases of minority victimization. This blueprint of criminal justice reform is often underpinned by a notion of "criminalization as outcome",[10] in which the formal outlawing of a particular form of conduct is believed to produce a determinate set of results (e.g. deterring would-be offenders and inciting public disapproval of the prohibited conduct). My analysis was informed by an alternative approach to conceptualizing criminalization. This approach emphasizes the fragmented and indeterminate nature of the practices through which societies label, identify and respond to "crime".[11] This concept depicts criminalization as a set of interpretive and institutional practices which bring into play the complex interactions between multiple social actors whose exercise of discretion can never be fully determined by formal legal rules. I applied this concept to analyze the processes whereby social movements, legislatures, citizens and crime-control officials have defined, identified and responded to "racist violence" throughout American history. Based on this analysis, I have shown that the highly diffused structure of processes of criminalization is likely to inhibit the suitability of specific "pro-minority" reforms to remedy the institutional failures which originally inhibited the equal protection of minority groups (i.e. through the enforcement of generic criminal laws prohibiting personal violence). As long as the institutional culture of crime-control agencies and the broader

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[9] Holder Urges New Hate Crime Laws", **San Francisco Chronicle** 16.06.09 (http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/06/16/national/w134036D70.DTL).

[10] On the distinction between 'criminalization as an outcome' and 'criminalization as a social practice' see Lacey (2009: 942-943).

[11] Lacey (1995).

social settings within which they operate continues to be permeated by the same discriminatory norms which obstructed the equal enforcement of generic laws in the first place, the restructuring of the legal frameworks through which instances of white-on-black (as well as sexist or homophobic) violence are being processed is unlikely to produce significantly better results.

The institutionalization of hate crime policies took place within cultural and institutional structures which in many respects were more conducive to the development of effective enforcement mechanisms than those prevailing in earlier periods of American racial history. Nevertheless, our analysis demonstrated that the transformative impact of this campaign has remained bounded by structural limitations which seem to be inherent to projects of "pro-minority" criminalization reform. On the one hand, the hate crime campaign gained ground in an historical moment in which overt forms of white supremacist violence were no longer regarded as acceptable, including in the South. This development had alleviated one of the most consequential cultural mechanisms which exacerbated blacks' vulnerability to violence throughout American history, that is, the normalization of extra-legal white supremacist violence in Southern culture. The alleviation of this pattern created conditions which have increased the tendency of official and non-official actors who participate in processes of criminalization to recognize the criminal nature of such violence.[12]

In addition, the hate crime campaign emerged in a historical moment in which crime enforcement institutions had been subjected to unprecedented pressures to incorporate respect for diversity within their professional ethos and practices.[13] For better or worse, as crime policymaking becomes a major site of electoral competition at the local, state and national levels, the challenges of legitimation which crime control institutions face become increasingly interwoven with those faced by legislatures. This constellation enabled the anti-hate crime movement to trigger not only legislative reforms but also the reform of institutional procedures, most notably in the fields of sentencing[14] and policing.[15]

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[12] However, it should be noted that it was not necessary to enact specific categories in order to utilize these conditions. Indeed, as James Jacobs observed, it could be argued that these cultural changes weaken the case for the enactment of specific "pro-black" arrangements. Jacobs and Potter (1998: 151).
[13] Sklansky (2008); Loftus (2008).
[14] Abrahamson (et al, 1994).
[15] Bell (2002); Hall (2005).

However, it is arguable that this distinctive aspect of the anti-hate crime campaign did not overcome the limits of piecemeal legal reforms but merely reproduced them in new institutional settings. As I argued in chapter 5, the priority given to initiating sentencing and (to a lesser degree) policing reforms was motivated by strategic attempts by single-issue organizations to utilize the new political opportunities opened up by the fierce politicization of these particular subfields of crime policy. Thus, the anti-hate crime movement had used evidence of racial disparities in sentencing to rationalize the need to install a penalty enhancement provision. However, because this campaign was not informed by a system-wide vision of how the alteration of this particular arrangement (the shift to a determinate sentencing format) would reallocate powers between different agencies involved in processes of criminalization, it ended up shifting the opportunities for discriminatory exercise of discretion from one agency (the judiciary) to another (prosecutors). The penalty enhancement arrangement provided prosecutors with a valuable bargaining chip which enhances their leverage in negotiating for plea bargaining. By rushing to impose stricter formal constraints on the exercise of judicial discretion, this reform diminished the extent to which judges are capable of constraining discriminatory exercise of prosecutorial discretion.

The impact of the anti-hate crime campaign on the policing of interracial victimization of African-Americans also reflects the inherent limitations of piecemeal reform of particular institutional arrangements within a pervasively stratified social order. The increasing salience of public debate over police mishandling of "hate crimes" has induced adaptive institutional responses aimed at providing visible benchmarks of improved performance. In particular, such reforms have focused on introducing formal criteria for labelling a crime as "motivated by hate" and the designation of specialist units dedicated to investigating "hate crime".[16] However, studies of the application of these guidelines by investigators have pointed to their inability to neutralize the subjective nature of judgments regarding the existence of "bias" in the selection of a victim or of evaluations regarding the weight of such "bias" in motivating the criminal act.[17] Moreover, it is also arguable that, given the fact that the rates of recorded intra-racial victimization far exceed those of inter-

[16] Hall (2005: chapter 9).
[17] Hall (2005: 160-162); Jacobs and Potter (1998: 96-99).

racial violence,[18] the allocation of greater resources to the latter problem, and its establishment as a paramount yardstick for assessing police performances in minimizing blacks' vulnerability to victimization, is misplaced.[19] These reforms seem to be particularly suitable to advance the legitimation needs faced by the police, particularly in the face of considerable evidence of over-targeting of African-Americans by racial profiling and other policing strategies.[20] Their suitability to ameliorate patterns of victimization among African-Americans is questionable.

Furthermore, the over-representation of African-Americans and Latinos among those prosecuted for hate crimes provides an additional example of how the transformative potential of this legislation is bounded by a perennial pitfall of piecemeal institutional reforms, that is, their tendency to reflect the priorities and the habitus of the institutions which enforce them rather than the original intentions of their initiators. This pitfall was pronounced in earlier phases in the development of "pro-black" criminalization policy as well. For instance, in the antebellum period, "slave abuse" legislation was predominantly enforced against poor white perpetrators outside plantations while leaving the large-scale mechanisms of exploitation and cruelty within plantations virtually unregulated. This dynamic is apparent in various other contexts in which the enforcement of "pro-minority" criminalization regimes correlates with general patterns of unequal enforcement and over-targeting of racial and ethnic minorities.[21] Studies of the enforcement of "no drop" domestic violence policies, for example, have documented their tendency to expose victims who belong to poor black and Latino communities to new forms of repression and intrusion by the State. The enforcement records of such policies reveal high rates of dual arrests and stricter surveillance by welfare bureaucracies.[22]

In summary, the analysis presented in this dissertation has showed that the standards against which the performances of hate crime policies are usually measured – namely, whether such policies work to tame visible patterns of institutional racism – are

[18] Kennedy (1998: 19).
[19] Guttel and Medina (2007).
[20] Harcourt (2007: 221); Banks (2003: 574).
[21] Crenshaw (1991: 1245-1251).
[22] Coker (2004); Mills (2003: 37-38).

both anachronistic and inadequate. They are anachronistic because, unlike earlier moments in American history, racial disparities in the administration of criminal justice today are produced by colour-blind policies. The fact that these policies over-target black offenders is usually attributed to their disproportionate offending rates, rather than to sheer racial discrimination. By and large, such rationalizations of existing enforcement disparities have been accepted by the Supreme Court and continue to enjoy wide social and political approval.[23] However, when gauged against the more adequate standard of their ability to counteract patterns of unequal enforcement which are presently pervasive within the modus operandi of crime control institutions, the contribution of hate crime policies is far from being certain. The over-targeting of African-Americans and Hispanic offenders (which correlate with their over-targeting in virtually all offence categories);[24] the re-criminalization of conducts which had already been outlawed (a trend which, as observed by William Stuntz, provides prosecutors with ultimate control over the outcome of the process);[25] and the focus on producing visible symbols of accommodating diversity rather than on fitting the allocation of resources to the trends reflected by victimization rates (an image-driven adaptive strategy which, as David Garland notes, is tied to the unbridled politicization of the criminal justice process)[26] provide three troubling examples of how hate crime policies reproduce rather than eliminate general patterns of unequal or inadequate enforcement. From a broader perspective, such cooptation reflects an important lesson about processes of criminalization: the impossibility of maintaining an enclave of racial egalitarianism within a broader institutional environment permeated by symptoms of racial inequality.

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[23] Banks (2003: 583-586).
[24] Gottschalk (2006: 19).
[25] Stuntz (2001: 510).
[26] Garland (2001a: 119).

C1.2. Exogenous Constraints on the Contribution of "Pro-Minority" Criminalization to Preventing Minority Victimization

As we saw in chapter 5, the recent proliferation of "pro-black" criminal lawmaking was enabled by a more fundamental paradigm shift. Over the last three decades, criminalization has come to play a much more pivotal role as a policy instrument through which social movements and governments reconstruct and act upon all sorts of social problems.[27] Until the recent financial crisis, the increasing salience of criminalization was interwoven with declining public trust in the suitability of welfare policies to ameliorate the core problems of American society. I argued that, while this political constellation provided single-issue organizations with favourable opportunities for initiating determinate sentencing reform, it also constrained the ability of racial reformers to mobilize types of policy intervention which could have been more effective in reducing crime levels. In essence, this is because, contrary to the main thrust of the anti-hate crime campaign, the preventive effects of criminal legislation (regardless of whether it is formulated as "pro-black") do not ultimately depend on the stipulation of longer and more determinate sentences. As explained above, this is partly because the internal fragmentation of processes of criminalization and the exercise of discretion by crime enforcement agents mediate between these formal rules of penal liability and actual enforcement practices on the ground. The preventive qualities of criminal legislation much more crucially depend on whether it is embedded within a broader array of policy measures which work to eliminate the criminogenic conditions cultivating these forms of offending.[28] This ultra-punitive character of hate crime laws reflects the dominant creeds of late-modern crime policy. However, as I have shown, this pitfall has been noticeable in previous eras of American racial history as well. At root, the failure to integrate criminalization with non-penal policy measures for reducing rates of black victimization stemmed from the resistance to developing structural racial reforms even in times in which the introduction of "pro-black" criminalization regimes was made possible (as discussed above).

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[27] Simon (2007a: 4).
[28] Von Hirsch (et al) (1999).

In chapter 2, we saw that the patterns of racial brutality outlawed by antebellum "slave abuse" laws were systematically facilitated by the pervasive mechanisms of economic exploitation, dehumanization, and political disempowerment which the system of slavery made possible. Thus, my claim that the introduction of "pro-slave" criminalization reforms was integral to the effort of Southern elites to accommodate the Abolitionist challenge provides a key for understanding why this regime was doomed to fail to have a significant impact on the prevalence of violence against slaves. In chapter 3, we showed that the patterns of lynching which thrived in late nineteenth century Southern society had been fully embedded within the seamless network of formal and informal measures installed by Southern governments and elites in order to restore white supremacy in the wake of the constitutional reforms of Reconstruction. My analysis of the structure of the politics of race in the post-Reconstruction decades (combining firm regional support for Jim Crow with Northern reluctance to intervene in Southern "domestic affairs") illuminated why both national and Southern legislatures refrained from developing effective legal responses to lynching. However, it also implied that the passing of such laws could not have minimized the prevalence of lynching (and, even less, of numerous other forms of racial degradation which were rife in the segregated public sphere of Southern society) as long as this relentless network of exclusionary mechanisms continued to operate.

In chapter 4, I have shown that the surge of anti-desegregation terror which had flared up in the South in the wake of *Brown* (late 1950s) was part and parcel of the broader array of measures installed by local authorities in order to impede desegregation in public schools. The Southern backlash reflected the widespread popular resistance to what had been perceived by Southerners as a paternalistic and illegitimate attempt to impose racial integration "from above", a public mood which was conducive to the resurgence of white supremacist vigilantism. The new regime of "federally protected activities" legislation was indeed embedded within a broader array of policies introduced by the federal government in order to abolish the larger system which nurtured these forms of white supremacist violence (that is: the Jim Crow system). This development was enabled by the polarization between the two regional systems of racial stratification in the mid twentieth century and the (short-lived) dominance of Northern racial moderates in shaping the contours of the politics of race in the mid 1960s. I have shown that recorded rates of white supremacist

violence in the South decreased significantly after the enactment of this legislation, although it was directly used for prosecuting racist perpetrators in only a meagre number of cases. It might be overstated to argue that there is a causal relationship between the introduction of "federally protected activities" legislation and the decreasing rates of this particular form of victimizing blacks. However, this sequence seems to be consistent with my general argument that the preventive effects of "pro-black" criminalization policies depend more heavily on their being supported by broader networks of extra-penal policies than on the severity or determinacy of the punishment which they stipulate.

As shown in chapter 5, the lion's share of recorded figures of "hate crime" involves violence between African-Americans and Latino-Americans in the poor neighbourhood of inner-city ghettoes.[29] It is plausible that these recorded figures reflect inequitable targeting of black and Latino offenders by the police. However, they are also consistent with various other indicators of the disproportionate vulnerability of African-Americans to social harm, including to personal violence.[30] As William J. Wilson has argued, this disproportionate vulnerability is produced by the demographic concentration of large segments of the black and Latino populations in the urban ghettoes, in which levels of poverty, violence, joblessness and social isolation have been exacerbated dramatically since the 1970s. My analysis in chapter 5 showed that the enactment of hate crime laws was insulated from any serious attempt to develop policy measures for alleviating the socio-economic mechanisms which foment these patterns of victimization. In fact, because the excessive use of penalization tend to aggravate rather than ameliorate the social pathologies which produce these overwhelming rates of criminality in American urban ghettoes,[31] hate crime policies seem to perpetuate the problem rather than to provide a cure. It also might have displaced the development of more effective instruments such as restorative justice and other community-level programs which seem to be much better equipped to dissuade reoffending.[32]

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[29] See Chapter 5 (section E1) of this dissertation.
[30] Wacquant (2008: 54-57); Sampson and Wilson (1995: 47).
[31] Wacquant (2009); Clear (2009).
[32] Miller (2008: 7).

As I have argued in more detail elsewhere,[33] similar drawbacks characterize many other "pro-minority" criminalization regimes which emerged over the last decades. For example, the interplay between intensified recourse to penalization and under-development of welfarist responses is noticeable in the transformation of domestic violence policies over the last three decades. The salience of 'tough on crime' policymaking in post-1970s American politics enabled feminist activists to induce the reform of policing, trial-procedure, and doctrinal arrangements which had long precluded the legal system from effectively protecting battered women.[34] At the same time, as shown by feminist critics of the dominant sexual victimisation agenda, the curtailment of welfare expenditures and the increasing conditionality of eligibility to welfare under neo-liberal policies have reduced the availability to battered women of a wide range of social services which are necessary for tackling the socio-economic dimensions of this problem.[35] This lack of focus on welfare responses seems misguided given the remarkably higher rates of recorded victimization among populations which suffer from economic and social marginalization.[36] Recent ethnographic research has suggested that prevailing patterns of domestic violence are fomented by the destabilising impact of recent shifts in the political economy on family structures and on cultural values in minority communities. For example, as one major study on domestic violence in second- and third-generation migrant communities has shown, such violence reflects the thriving of misogynist street culture which normalizes sexual conquest and paternal abandonment in these communities, brought about by the exacerbation of poverty and unemployment in de-industrialized inner cities.[37]

The tackling of the root causes of domestic violence necessitates the integration of policy instruments which can attenuate both the socio-economic and the cultural dimensions of this form of offending. However, as Marie Gottschalk has argued, post-1970s campaigns in this field have marginalized the socio-economic aspects of domestic violence.[38] Similarly to the unfolding of the anti-hate crime reformist agenda, the elevated public profile of the problem regrettably materialized in an era in which such grievances have been predominantly

[33] Aharonson (2010: pp. 22-25).
[34] Simon (2007a: 189).
[35] Bumiller (2008); Mills (2003).
[36] Coker (2004).
[37] Bourgois (1996).
[38] Gottschalk (2006: 163).

channelled to the penal sphere and have become insulated from a broader vision of social-democratic progressive reform. This dynamic of cooptation is rooted, as shown by my analysis of the origins of "pro-black" legislation, in the interaction between structural forces (pushing toward the containment of reformist struggles within politically manageable ideological bounds) and social action (the strategic decisions of social movements to fit their agenda to the logic of dominant ideological trends).

C2. The Limitations of "Pro-minority" Criminalization as an Expressive Vehicle: The Dialectics of Recognition and Legitimation

One of the most prominent justifications of hate crime laws focuses on the expressive dimension of this legislation.[39] It is argued that hate crime laws are necessary for expressing the entitlement of all citizens to equal concern and respect.[40] The focus on the expressive dimension as a self-standing justifying aim reflects recent developments both in criminal law theory (most notably, the flourishing of communicative theories of punishment)[41] and in American political discourse at large (most notably, the proliferation of the politics of recognition as a prominent platform of egalitarian reform).[42] However, as I showed in this study, the attempt to capitalize on the expressive qualities of criminal law in order to facilitate wider egalitarian reforms is by no means new. It harks back to the antebellum era, when Abolitionists used evidence of racial brutality in plantations in order to de-legitimate Southern slave system, while, in response, Southern authorities passed "slave abuse" laws which sought to demonstrate the reconcilability of slavery with principles of legality and humanity. One of the distinctive contributions of this dissertation was to trace the underpinnings and consequences of the use of "pro-black" criminalization campaigns and lawmaking as vehicles of political communication throughout American racial history.

This investigation revealed that public debates over the appropriate legal responses to racist violence have served as salient sites of struggle over the terms of African-Americans' membership in the American polity. The consequences of such struggles were complex and

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[39] Lawrence (1999: 167-169); Kahan (1996).
[40] Harel and Pachomovsky (1999).
[41] Duff (1996); Kahan (1996).
[42] Fraser (2000).

double edged. The political effects of "pro-black" criminalization reforms, I argued, are best depicted in terms of a dynamic interplay between two competing communicative effects. On the one hand, such legislation has served as a vehicle of recognition and symbolic inclusion. The official acknowledgment of the harmfulness and wrongfulness of such conduct, and of the entitlement of African-Americans to equal legal protection, has served to symbolize their formal inclusion into the framework of American citizenship. Kimberlé Crenshaw's reminder that "the possibility for ideological change is created through the very process of legitimation, which is triggered...when powerless people force open and politicize a contradiction between the dominant ideology and their reality" is highly important for recalling the significance of such reforms, even if, as she acknowledges, "because the adjustment is triggered by the political consequences of the contradiction, circumstances will be adjusted only to the extent necessary to close the apparent contradiction".[43] Our analysis stressed that, although such messages were rarely translated into effective enforcement policies, they nevertheless had entailed a transformative dimension.

On the other hand, the decision of progressive racial reformers to resort to 'the victimization frame' in order to protest against structural patterns of social inequality entails attendant costs. As our analysis of the origins of "pro-minority" criminalization observed, both governments and public opinion have been more willing to recognize the entitlement of African-Americans to equal concern and respect when this principle has been infringed by individual bigots than when it was compromised in putatively "non coercive" manner by State-sponsored policies or by the 'invisible hand' of market forces.[44] However, because the willingness to recognize the harmfulness of these "pathological" cases of racial domination was interwoven with the resistance to acknowledge the illegitimacy of the structure of racial relations at large (which was rife with numerous "normalized" forms of racial domination), it seems that the limited transformative potentiality of such recognition was intrinsic to its very conditions of existence.

Throughout American racial history, "pro-black" criminalization policies have affirmed the principle that race should not serve as a ground for depriving African-Americans of basic

[43] Crenshaw (1988: 1369).
[44] Cf. Hale (1924).

civil rights which criminal law enshrines. In the slavery era, this principle was applied to slaves' right to life and (later on) to their right to basic standards of human dignity. In the civil rights era, this principle was expanded to include political and equal opportunity rights. In the post-1980 era, it was extended to encompass racial bias per se. Yet, the way in which criminal law frames this principle inevitably excludes the vast majority of social practices which infringe it. To emphasize, the inevitability of such exclusion does not derive solely from racial prejudice. The limitations of criminal law as a vehicle of recognition are built into the discursive and institutional determinants which govern the types of social harm which can (and those which cannot) be tangibly constructed as "criminal wrongs" and to be policed, prosecuted, and proven in a criminal trial.[45]

These structural limitations generate two major dilemmas for progressive social movements considering whether to have recourse to the expressive qualities of criminal law by means of mobilizing "pro-minority" criminalization reforms. First, because criminal law is widely perceived to be dealing with the most harmful forms of social action,[46] there is a danger that the establishment of "pro-minority" criminalization regimes will channel public debate towards over-focusing on the narrow ambit of conducts that can be processed as "criminal wrongs". In this way, "pro-black" criminalization might obliquely divert public attention away from the large-scale mechanisms of racially-skewed harm production which are built into the everyday functioning of labour markets, social institutions, and the political system. This pitfall becomes particularly acute in the current political climate, amid the increasing salience of crime as an issue of media coverage and electoral mobilization. This constellation, I showed in chapter 5, impels progressive social movements to prioritize the framing of collective grievances in terms of crime and victimization.[47] In the context of the struggle for racial justice, the proliferation of the anti-hate crime campaign might have impoverished public debates on how race serves as a factor which shapes differential exposure to harm in contemporary American society. Without derogating from the severity of the problems emphasized by this campaign, it is puzzling that the threat posed by individual racist bigots to the nation's race relations

[45] Hillyard (et al, 2004).
[46] As implied by classical articulations of the harm principle.
[47] Simon (2007a: 109).

gained such a prominent place on the agenda of black activists in the very same moment in which neoliberal governments renounced their responsibility to provide social security through regulation of the much more wide-ranging processes of harm production built into post-industrialist economy.[48] This puzzle seems to be particularly acute with regard to African-Americans, who had clearly been positioned at the receiving end of the processes of economic and social marginalization which the post-Keynesian economy had fostered. However, it should also be considered in various other contexts in which identity-based degradation and economic marginalization are deeply intertwined.[49]

Secondly, by reaffirming the image of the legal system as committed to the enforcement of individuals' right to equal concern and, such legislation might imply that those policies and actions that have been legally and constitutionally approved are indeed compatible with this moral principle. Ironically, this high-profile legislation might make the most acute forms of racially-patterned social harm less visible. Indeed, the question of what amounts to a racially-patterned deprivation of rights is increasingly complex and elusive today. The entrenchment of the ethos of formal racial equality throughout the last decades created fundamentally polarized effects across class divides. While it facilitated the integration of middle and upper class African-Americans into the highest ranks of American politics, culture and economy, it has also served to foment popular resentment to the extension of redistributive projects of racial egalitarianism. The starkly disproportionate rates of African-Americans among those living in extreme poverty or behind bars provide grim evidence of the enduring significance of race in shaping the life chances of individuals.[50]

For these reasons, my analysis has shown that the expressive functioning of hate crime policies has been much more complex than acknowledged by exponents of the expressivist rationale of such legislation. While this legislation has enhanced solidarities with African-American victims of interracial violence, this form of solidarity might be too 'thin' to bolster public support of more substantive enterprises of egalitarian reform. The expectation that "pro-minority" criminalization reforms would serve as a vehicle of

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[48] Reiner (2007a: 4).
[49] I have discussed this more in length elsewhere, see: Aharonson (2010: 20-22).
[50] Western (2006: chapter 1).

consciousness-raising[51] is, in short, entirely incompatible with our socio-legal knowledge of how criminal law works both as an expressive and as a regulatory tool. Hate crime laws appear to be unable – indeed, American "pro-black" criminalization never has been able – to realize its stated aims in either preventive or expressive terms.

D. Epilogue: Law and Social Change – A Final Reflection on an Old Conundrum

Our inquiry into the role played by "pro-black" criminalization regimes in facilitating and hindering the mobilization of egalitarian racial reform in the US touched upon a fundamental problem in the sociology of law, namely, the relationship between the functioning of law as a social force and its character as a social product. This relationship is particularly intricate when marginalized minority groups have recourse to legal institutions in search of recognition and a remedy to particular symptoms of their predicament. On the one hand, law serves as a salient medium through which liberal democracies symbolize their commitment to principles of liberty and equality. In the context of the governance of intergroup inequality, law acquires this unique role by censuring racist, sexist or homophobic norms and thus presenting itself as transcending beyond social conflicts. At the same time, law communicates and enforces such messages via institutional apparatuses and cultural practices which take shape within social environment permeated with symptoms of such inequalities.

The recognition of this inherent tension within the liberal vision of "law as an emancipatory force" does not necessarily spell a dystopian denial of the possibility of social progression toward a fuller realization of egalitarian norms. Nor should it necessarily imply that law cannot contribute to such processes. However, this observation should urge us to adopt a more realistic vision of what criminalization (as well as other forms of juridifying social problems) can and cannot achieve. This vision should take on board both normative and sociological perspectives in order to analyze the complex ways in which "pro-minority" legal reforms work both to enable and to constrain the pursuit of a more just and equal society.

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[51] MacKinnon (1991a: 83-105).

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